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MICHAEL RODAK, JR., CLERK

No. 73-1689

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
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JURISDICTIONAL STATEMENT

OPINION BELOW

The findings and conclusions of the district court (App. A) are not reported.

JURISDICTION

The judgment of the district court (App. B) was entered on December 12, 1973. A notice of appeal to this Court (App. C) was filed on February 7, 1974. On March 1, 1974, Mr. Justice Douglas extended the time for docketing an appeal until May 11, 1974. The jurisdiction of this Court is conferred by Section 2 of

the Expediting Act (15 U.S.C. 29). *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526.

QUESTION PRESENTED

Whether a corporation which performs janitorial and maintenance services within a single state for companies which sell products in interstate and foreign commerce, which solicits and negotiates such contracts through interstate communications, and which purchases substantial quantities of supplies originating in other states, is "engaged in commerce" for purposes of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, provides in pertinent part:

> "Commerce", as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The United States instituted this civil antitrust suit against American Building Maintenance Industries ("ABMI") on January 8, 1971, contending that ABMI violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring the stock of J. E. Benton Management Corp. and by merging Benton Maintenance Company into American Building Maintenance Company of California. The complaint alleged that the merger and acquisition, which was consummated in 1970, may substantially lessen competition in the sale of janitorial services in Southern California and the Los Angeles area.[1] On December 12, 1973, the district court granted the defendants' motion for summary judgment, holding that neither of the Benton com-

[1] The complaint defines "Southern California" as Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino and Riverside Counties.

panies was "engaged in commerce" within the meaning of Section 7 of the Clayton Act at the time of the merger and acquisition.

A. THE ACQUIRING COMPANY AND THE INDUSTRY

American Building Maintenance Company of California is a wholly owned subsidiary of ABMI. The complaint alleged that ABMI is the largest seller of janitorial services in Southern California and one of the largest sellers of such services in the country. It has 56 janitorial service branches serving 500 communities in the United States and Canada. The complaint alleged that ABMI had national revenues of about $52.4 million and Southern California revenues of about $10.9 million from janitorial services in 1969. ABMI's Southern California sales represented about 10 percent of the total janitorial service sales in that area.

The service industries are the fastest growing segment of the American economy. More than half of the nation's work force is employed in those industries and soon more than half of this country's Gross National Product will be generated in the service sector. The supplying of janitorial services by independent contractors is one of the fastest growing service businesses. Receipts for such services increased by 324 percent from 1958 to 1967. In 1972, national receipts for commercial, institutional and industrial cleaning services were more than $1 billion (Aff. of Philip Neff).

There is a nationwide trend toward concentration in the janitorial service industry. The four largest

firms have made at least 170 acquisitions of janitorial service and related businesses since 1961. ABMI made 54 of those acquisitions. ABMI's acquisitions included five janitorial service companies in the Los Angeles area in addition to the Benton companies (Aff. of John D. Gaffey).

ABMI has publicly acknowledged that it intends to accelerate this acquisition program. In a December 1971 speech to institutional investors, ABMI's president stated: "We have been buying four-six companies a year. I would say in the future it would be fair to estimate that we will buy between six and eight companies a year" (Aff. of John D. Gaffey).

B. THE ACQUIRED COMPANIES

Jess E. Benton, Jr. owned all of the stock of J. E. Benton Management Corp. and 85 percent of the stock of Benton Maintenance Company at the time of the merger and acquisition (Aff. of Jess E. Benton, Jr.). Both companies sold janitorial services; Benton Management also provided building management services and engaged in the real estate business. All of the facilities served by these companies were located in Southern California. The complaint alleged that the Benton Companies ("Benton") was the fourth largest seller of janitorial services in Southern California, with 1969 sales of about $7.2 million. This represented about 7 percent of the total sales in that area.

C. BENTON'S OPERATIONS

Benton's customers included TRW, Inc., Jet Propulsion Laboratory, Rockwell International, General

Telephone Co. of California, Pacific Telephone and Telegraph Co., Mobil Oil Corp., Union Oil Co., Texaco, Inc., Carnation Co., Teledyne, Inc. and Tishman Realty & Construction Co. Benton maintained and cleaned offices, manufacturing areas and laboratories for its aerospace customers, offices and rooms housing telephone switching equipment for its telephone company clients, corporate headquarters buildings for Union Oil, Carnation and Teledyne, and regional headquarters buildings for Mobil and Texaco.[2] Benton also performed all the janitorial services for the owner and tenants at Tishman Plaza, a large office complex in the Los Angeles area (Aff. of Alan D. Levy).

In some cases Benton's activities were confined to cleaning services, in other cases it assumed responsibility for maintaining heating, air conditioning, electrical and plumbing services, and paid utility bills for Texaco (Aff. of Edward H. Patotzka).

Although all of Benton's maintenance contracts were performed in California, some of the contracts were negotiated with out-of-state owners. The Tishman Plaza contract was executed by Tishman executives based in New York (Aff. of Alan D. Levy), and the New York Life Insurance contract was the product of interstate negotiations. Those two contracts

[2] Affidavits of Charles V. Engle (TRW); Raymond Hernandez (Jet Propulsion Laboratory); Charles W. Moxley and John Blain (Rockwell); Donald E. Del Dosso (General Telephone); George G. Guest (Pacific Telephone); John Stover (Mobil); L. B. Higbee (Union Oil); Edward H. Patotzka (Texaco); Maynard Heider (Carnation); and Edmund Sakowicz (Teledyne).

made a significant contribution to Benton's total revenue.[3] Benton also used interstate communications to solicit other contracts (Aff. of John D. Gaffey).

Benton purchased substantial quantities of janitorial supplies and other goods manufactured outside of California. In 1969 Benton purchased more than $120,000 in janitorial supplies which were manufactured outside California [4] and paid about $36,000 in lease fees attributable to vehicles and a computer which were manufactured in other states (Aff. of John D. Gaffey).[5]

D. THE SUMMARY JUDGMENT PROCEEDINGS

ABMI filed a motion for summary judgment together with proposed findings of fact and conclusions of law. After receiving memoranda, affidavits and counter-affidavits from both parties and hearing oral argument, the district judge signed the findings and conclusions which ABMI had submitted.

The court found that the Benton companies conducted their businesses entirely within California, that Benton did not advertise nationally. The court

[3] The details of these transactions are contained in exhibits covered by the district court's protective order of June 2, 1971.

[4] The district court findings focused only on Benton's direct interstate purchases which were admittedly small. The court found direct purchases aggregating approximately $140 and interstate telephone calls of $19.78 (Finding 7, App. A, pp. 16–17; Finding 15, App. A, p. 18). The findings do not reflect Benton's purchases of out-of-state products from local distributors, which as noted in the text, were substantial.

[5] Benton also expended about $80,000 of funds advanced by clients for gas, water, electricity and elevator parts which originated outside of California (Affidavits of John D. Gaffey, James J. Breen).

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also found that Benton's purchases of products "which were shipped to it from outside California" and its expenditures for interstate telephone calls were *de minimus*. (App. A, pp. 17, 18) The court concluded that each Benton company "was not a corporation engaged in commerce" and that "[t]here is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act (15 U.S.C. § 18)" (App. A, p. 20).

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question involving the reach of Section 7 of the Clayton Act. That section prohibits anticompetitive acquisitions of corporations "engaged in commerce." The question is whether Section 7 applies to acquisitions of firms which, although conducting primarily a local business, nevertheless serve customers who themselves are engaged in interstate commerce, and which, in providing such services, make substantial purchases of goods shipped in interstate commerce. The district court's narrow interpretation of the reach of Section 7 is inconsistent with the basic congressional purpose reflected in that section of arresting in their incipiency anticompetitive trends toward concentration, and would seriously weaken the effectiveness of that section in accomplishing that purpose.

This Court has already recognized the importance of the issue. One of the questions which it agreed to review when it granted the petition for certiorari in

Gulf Oil Corp. v. *Copp Painting, Inc.*, No. 73-1012 [granted March 25, 1974], involves the applicability of Section 7 to the acquisition of a company which produces and sells intrastate asphalt that is used on interstate highways.[6] The present case involves a similar question concerning the reach of Section 7. We believe that it would be appropriate for the Court to consider the two cases together, which would enable it to examine the reach of the statute in related but different factual settings.

1. This Court has recognized that in enacting the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533, 558. Accordingly, the Sherman Act has been applied to all activities which substantially affect interstate commerce. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219. We sub-

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[6] The question states in relevant part:

> With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law,
>
> * * * * *
>
> (c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce", and that "the effect * * * may be substantially to lessen competition or tend to create a monoply," where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?

mit that Section 7 of the Clayton Act, which was designed to provide "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317), was intended to have a similar reach.

The Court of Appeals for the Third Circuit has recognized that when Congress originally enacted Section 7 of the Clayton Act in 1914, it intended that provision to have just as broad a reach as the Sherman Act. In *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 166, the court said:

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

While the legislative history of the original Section 7 does not contain an extended discussion of the "commerce" requirement, it does indicate that Congress intended fully to exercise its commerce power. The "engaged in commerce" language of Section 7 and

the definition of commerce in Section 1 of the Clayton Act, 15 U.S.C. 12, were part of the original bill reported by the House of Representatives Judiciary Committee. The House Report stated that the "definition of commerce * * * is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts." H. Rep. No. 627, 63rd Cong., 2d Sess., p. 7. The Report also said that Section 8, which became Section 7, "* * * is intended to eliminate this evil [the aggregation of economic power through stock acquisition] so far as it is possible to do so * * *." *Id.* at 17.[7]

In 1950 Congress amended Section 7 to extend it to acquisitions of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that history reflects a continuing Congressional intent to fully exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading

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[7] At the time of the passage of the Clayton Act in 1914 the distinction between activities "in commerce" and activities "affecting commerce" had not been fully developed. The *Shreveport Rate Cases*, 234 U.S. 342, decided in 1914, has recognized Congress' power to regulate activities substantially affecting interstate commerce. The principles of the *Shreveport Rate Cases* were subsequently applied to the Sherman Act, passed in 1890. See *Mandeville Island Farms*, *supra*. Those principles are equally applicable to Section 7 of the Clayton Act.

congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected Congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Under the district court's restrictive interpretion of Section 7, a firm such as ABMI could obtain a virtual monopoly of a service industry, which is inherently local, by acquiring one local firm after another. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * * [H. Rep. No. 1191, 81st Cong., 1st Sess. 8.]

This Court has observed that the commerce requirement in every statute "presents a unique problem in which words derive vitality from the aim and nature of the specific legislation." *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 351.

In Section 7, as it stood after the Celler-Kefauver Amendments of 1950, 64 Stat. 1125, 1126, the commerce requirement was not stated separately. Instead, in a single comprehensive sentence the amended statute bars corporations "engaged in commerce" from acquiring the stock or assets "of another corporation engaged also in commerce", "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. The commerce requirement, therefore, was defined by the entire sentence. It should have been read by the district court in its total context rather than in isolation. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168.

It would indeed have been anomalous for Congress, which in 1950 strengthened Section 7 to prohibit in their incipiency anticompetitive practices before they developed into full-blown violations of the Sherman Act, not to have intended to exercise the same full reach of its commerce power that it had long since utilized in the Sherman Act itself. Otherwise, the congressional attempt to deal with these practices before they reached the stage of Sherman Act violations would have been seriously weakened.

2. This merger and acquisition had a substantial effect upon interstate commerce. Benton derived 80 percent to 90 percent of its revenues from customers who were engaged in selling goods in interstate and foreign commerce or in providing interstate communi-

cations facilities (Aff. of John D. Gaffey). Benton's services were an essential and important part of the interstate and international operations of those clients.*

Benton also purchased or leased substantial quantities of janitorial supplies and other goods which originated outside of California. Purchases of supplies originating in other states have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. See, *e.g., Burke* v. *Ford*, 389 U.S. 320; *United States* v. *Employing Plasterers Assoc.*, 347 U.S. 186.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1974.

* Affidavits cited in n. 2, *supra*. Even if Section 7 were deemed to require activities in the "flow of commerce", Benton's intimate involvement in the operations of its clients which were unquestionably engaged in interstate commerce satisfies such a restrictive test. Moreover, Benton engaged in a form of interstate sales activity by negotiating contracts with persons in other states and by soliciting contracts through the use of interstate facilities.

APPENDIX A

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF California

CIVIL ACTION NO. 71-55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, and it appearing that there is no genuine issue as to the facts hereinafter set forth, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Defendant American Building Maintenance Industries is, and at all times relevant to this action was,

a corporation organized under the laws of the State of California, having its principal office in San Francisco, California.

2. J. E. Benton Management Corporation, formerly named Pacific Realty Securities Company, was at all times relevant to this action a corporation organized under the laws of the State of California having its only office in Los Angeles, California.

3. On June 30, 1970 all of the stock of J. E. Benton Management Corporation was acquired by defendant.

4. Prior to June 30, 1970 and at all times relevant to this action, J. E. Benton Management Corporation engaged in the real estate business and the business of providing building management, janitorial and related services. These were the only businesses engaged in by J. E. Benton Management Corporation and they were conducted entirely within Los Angeles, Orange and Ventura Counties in California.

5. J. E. Benton Management Corporation had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how, and no location or business situs advantage.

6. Between March 1, 1970 and June 30, 1970 J. E. Benton Management Corporation made no purchases of products which were shipped to it from outside California.

7. Between March 1, 1969 and February 28, 1970 J. E. Benton Management Corporation made no purchases of any product or services of any kind or character which were shipped to it from outside California except the following:

(a) Real estate publications costing $13.39 from Matthew Bender Company, Albany, New York;

(b) Reel rack costing $25.01 from Monarch Metal Products, New Windsor, New York;

(c) Income tax publication costing $79.98 from Prentice Hall, Inc., Englewood Cliffs, New Jersey; and

(d) Sign purchase costing $11.97 from Ready Made Sign Company, Long Island, New York.

These purchases do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

8. J. E. Benton Management Corporation did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

9. Benton Maintenance Company, formerly named S. W. Straus & Co. and Affiliated Maintenance Company, was at all times relevant to this action a corporation organized under the laws of the State of California, having its only office in Los Angeles, California.

10. On June 30, 1970 Benton Maintenance Company was merged into American Building Maintenance Company of California, a subsidiary corporation of defendant.

11. At all times relevant to this action Benton Maintenance Company was engaged in the business of providing janitorial and related services. This was the only business engaged in by Benton Maintenance Company and it was conducted entirely within Los Angeles, Orange and Ventura Counties in California.

12. Benton Maintenance Company had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how and no location or business situs advantage.

13. Between January 1, 1969 and June 30, 1970 Benton Maintenance Company made no purchases of products which were shipped to it from outside California.

14. Benton Maintenance Company did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

15. J. E. Benton Management Corporation and Benton Maintenance Company received telephone services from The Pacific Telephone and Telegraph Company ("Pacific") over telephone number 737–3220 through a single switchboard at their offices located at 3727 West Olympic Boulevard, Los Angeles, California. From January 1969 through June 1970 Pacific billed J. E. Benton Management Corporation $18,310.70 for these services. Pacific was paid $18,260.45 on these bills of which $19.78 represented payment of charges for ten out-of-state calls apparently related to the business activities of the Benton corporations. These ten calls do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

16. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.

17. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with its suppliers. There are no significant economies to be realized through

bulk or quantity purchases of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial service. The basic service provided was the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of total amounts paid by customers for janitorial services.

18. The major suppliers of the Benton corporations were:

(a) Ball Industries, El Segundo, California, which delivered industrial and janitorial equipment and supplies from its warehouse to the Benton corporations' warehouse at 3727 West Olympic Boulevard or to customer locations specified by the Benton corporations;

(b) National Sanitary Supply Co., Los Angeles, California, which delivered paper goods and other janitorial supplies from its warehouse to the Benton corporations' warehouse or to customer locations specified by the Benton corporations;

(c) U.S. Guards, Monterey Park, California, which provided the Benton corporations with building guard services on a subcontract basis; and

(d) Courtesy Chevrolet Leasing, Los Angeles, California, which leased vehicles to the Benton corporations.

19. Plaintiff United States of America does not allege in its complaint herein that the Benton corporations, or either of them, are engaged in commerce, nor does plaintiff allege that the effect of the acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in areas other than areas wholly within California.

20. The following Conclusions of Law, insofar as

they may be considered Findings of Fact, are so found to be true in all respects and are to that extent adopted by the Court as Findings of Fact.

Based upon the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

21. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

22. J. E. Benton Management Corporation was not a corporation engaged in commerce at the time of the acquisition of its stock by defendant.

23. Benton Maintenance Company was not a corporation engaged in commerce at the time of its merger into American Building Maintenance Company of California, a subsidiary corporation of defendant.

24. There is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act. (15 U.S.C. § 18.)

25. Plaintiff United States of America is not entitled to a judgment or a final decree or damages against defendant.

26. Defendant is entitled to a summary judgment in its favor dismissing this action and judgment of dismissal should be entered accordingly.

27. The foregoing Findings of Fact, insofar as they or any of them may be considered Conclusions of Law, are to that extent hereby adopted by the Court as Conclusions of Law.

Dated at Los Angeles, California, this 12th day of December, 1973.

JESSE W. CURTIS,
United States District Judge.

APPENDIX B

United States District Court, Central District of California

CIVIL ACTION NO. 71–55
UNITED STATES OF AMERICA, PLAINTIFF
v.
AMERICAN BUILDING MAINTENANCE INDUSTRIES,
DEFENDANT

SUMMARY JUDGMENT OF DISMISSAL IN FAVOR OF DEFENDANT AMERICAN BUILDING MAINTENANCE INDUSTRIES AGAINST PLAINTIFF UNITED STATES OF AMERICA

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, the Court made its Findings of Fact and Conclusions of Law, and it appearing that there is no genuine issue as to any material fact and that said defendant is entitled to a judgment of dismissal as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment of dismissal be

entered in favor or defendant American Building Maintenance Company against plaintiff United States of America dismissing the above entitled action, and that said plaintiff take nothing on his complaint from defendant, and that said defendant have and recover its costs from said plaintiff in the sum of $.

Dated at Los Angeles, California this 12th day of December, 1973.

JESSE W. CURTIS,
United States District Judge.

United States District Court, Central District of California

CASE NO. 71–55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

NOTICE OF ENTRY

To the above named parties and to their attorneys of record:

You are hereby notified that Summary judgment of dismissal in favor of defendant American Building Maintenance Industries against plaintiff United States of America in the above entitled case was entered in the docket on December 12, 1973.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (*After* sixty days in cases in which the United States, its officers or

agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on December 12, 1973, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Lawler, Felin & Hall,
605 W. Olympic Blvd.,
Los Angeles, Calif.

Michael J. Dennis, Esq.,
Department of Justice,
Antitrust Div.
Los Angeles, Calif.

EDWARD M. KRITZMAN,
Clerk.

By JOE R. FLORES,
Deputy Clerk.

APPENDIX C

United States District Court, Central District of California

CIVIL NO. 71-55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

NOTICE OF APPEAL OF SUMMARY JUDGMENT OF DISMISSAL

To: Defendant American Building Maintenance Industries and to its attorneys of record:

PLEASE TAKE NOTICE that the plaintiff United States of America appeals to the United States Supreme Court under the provisions of 15 U.S.C. § 29 the Summary Judgment of Dismissal in Favor of Defendant American Building Mainteniance Industries Against Plaintiff United States of America entered herein on December 12, 1973.

DATED FEBRUARY 6, 1974.

MICHAEL J. DENNIS,
Attorney, Department of Justice.

U.S. GOVERNMENT PRINTING OFFICE : 1974

Supreme Court, U. S.
FILED
MAR 3 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1689

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED MAY 10, 1974
PROBABLE JURISDICTION NOTED JANUARY 13, 1975

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1689

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

DOCKET ENTRIES

DATE	PROCEEDINGS
1/8/71	Fld complt for Violn of Clayton Act. purs. 15 USC 18 & 25. Md JS-5. Issd summs.
1/27/71	Fld retn of summs.
2/1/71	Fld stip & ord (JWC) extendg time fordeft to plead or move to the complt may have to & includg 3/8/71.
3/5/71	Fld stip & ord (JWC) extendg time for deft to plead may have to & includg 4/7/71.
3/30/71	Fld plft's first set of interrogs to deft.
4/7/71	Fld deft ANSWER to complt.
4/8/71	Fld & mld not of P/T conf set for 6/21/71, 10 AM.
4/12/71	Fld first set of interrogs propounded to plft by deft American Building Maintenance Industries.
5/3/71	Fld stip & ord (JWC) extending time to ans or object to interrogs, retable 5/30/71, & plft may have to 6/10/71, within which to ans or object to the first set of interrogs propounded to plft by deft.
5/14/71	Fld stip & ord (JWC) contg P/T conf retable 8/23/71, at 10 am.
5/28/71	Fld stip & ord (JWC) extending time to ans or object to interrogs retable 6/6/71, 6/30/71, & 7/10/71.
6/2/71	Fld stip re PROTECTIVE ORDER & fld protective ord (JWC).
6/8/71	Fld stip & ord (JWC) extending time to ans or object to interrogs retable 6/9/71.
6/9/71	Fld Deft Amer Bldg Maintenance Industries partial ans to first set of interrogatories. Fld CONFIDENTIAL LISTS fl purs to Protective order ent 6/2/71—placed in SEALED envelope and given to Mr. Drew.
6/30/71	Fld final ans of deft American Building Maintenance Industries to first set of interrogs propounded by plft.

DATE	PROCEEDINGS
7/15/71	Fld ans & objections to first set of interrogs propounded to plft by deft American Building maintenance Industries.
7/19/71	Fld stip & ord (JWC) re protective ord; Fld protective ord (JWC); Fld stip & ord (JWC) contg P/T conf retable 11/8/71, at 10 am.
8/6/71	Fld plft not of tak depos upon oral examination of Robert E. Benton & of John Barta on 9/2/71 for Benton & 9/15/71 for Barta.
8/9/71	Fld plft's second set of interrogs to deft.
8/10/71	Fld plft's request to deft to produce documents for inspection & copying.
9/7/71	Fld stip & ord (JWC) extending time to ans or object to interrogs retable 9/13/71.
9/16/71	Fld stip & ord (JWC) extending time to ans or object to interrogs retable 9/20/71.
9/21/71	Fld ans & objections of deft American Building maintenance Industries to second set of interrogs propounded by plft;
9/30/71	Fld stip re protective ord & fld protective ord (EC).
10/27/71	Fld stip & ord (EC) contg P/T conf retable 2/7/72.
1972	
1/24/72	Fld stip & ord (JWC) cont P/T conf retnbl 4/10/72, 10 am.
4/4/72	Fld stip & ord (JWC) contd PTC retable 6/12/72 10 am.
6/6/72	Fld stip & ord (EC) cpmt PTC retrnble 8/21/72, 10 am.
8/10/72	Fld plf's not of tkng depo s of Jess Benton III on 8/29/72 w/service thereon.
8/14/72	Fld stip & ord (JWC) extending time for deft 10 am.
9/25/72	Fld plf's request to deftto produce docuents for inspection & cpyng; Fld plf's 3rd set of interrogs to deft.
10/17/72	Fld stip & ord (JWC) ext ti for deft to ans or object to interrogs to and includg 11/3/72 and cont pre-trial conf to 12/13/72 10 AM.

DATE	PROCEEDINGS
10/25/72	Fld deft's response to plt's request to produce docs.
11/3/72	Fld stip & ord (JWC) ext ti to ans or objent to interrogs to and includg 11/17/72.
11/17/72	Fld stip & ord (JWC) ext ti to ans to object to interrogs and cont PTC conf.
11/28/72	Fld deft American Building Maintenance Industries' partial ans of deft American Building Maintenance Industries to 3rd set of interrogs propounded by plf.; Fld stip & ord (JWC) extndng time to ans or objct to interrogs to 12/4/72.
12/5/72	Fld deft's partial ans of deft to 3rd set of interrogs propounded by plf.
12/5/72	Fld stip & ord (JWC) ext ti to ans interrogs to and includg 12/11/72.
12/13/72	Fld stip & ord (JWC) ext ti to ans or object to interrogs to and includg 12/18/72 and cont PTC to 3/12/73, 10 am.
12/20/72	Fld deft American Bldg Maintenance Industries' partial ans to 3rd set of interrogs propounded by plf.
12/21/72	Fld deft's partial ans to 3rd set of interrogs propounded by plf.
12/27/72	Fld partial ans of deft American Building Maintenance Industries to 3rd set of interrogs propounded by plf.
3/7/73	Fld stip & ord (JWC) cont PTC to 6/11/73, 10 am.
5/1/73	Fld pltf's request to prod docs for inspection and copying. Fld pltfs' fourth set of interrogs to deft.
5/11/73	Fld Plft's Note of Taking Deposition of Steven Brown on 5/21/73.
5/16/73	Fld Deft's Note of Mtn & Mtn for protective ord, affidavit of Anthonie M. Voogd & Memo of pts & auths in support of Mtn.; Fld Application of deft for an ex Parte ord shortening time, affidavit of Anthonie M. Voogd & Memo purs to L.R. 3(j).
5/21/73	Fld ord (JWC) all discovery procdgs stayed until 6/11/73, that the parties shall confer

DATE	PROCEEDINGS
	w/respect to settlement of the action, that the parties shall report on the progress of settlement negotiations at the Status conference at 10 am on 6/11/73, in plc of the previously sched PTC.
6/11/73	For status hrg & on mot of cnsl ord cont to 7/23/73, 10 AM.
7/2/73	Mld not on Ct's own mot ord P/T conf cont to 7/30/73, 10 am.
7/25/73	Fld U.S.A. proposed agenda for the status conf on 7/30/73.
7/27/73	Fld deft's response to plft's proposed agenda for the status conf on 7/30/73.
7/30/73	Fur status hrg. Consl for deft hv to 8/17/73 to file mot for summ judgmt & cnsl for pltf to file response by 9/4/73. Fur stay of Discov until hrg on mot for summ judgmt. Cnsl for pltf to prep ord.
8/28/73	Fld Deft Stip & ORD (JWC) with regard to deft's motn for S/J of dism.
	Fld Deft Notc of Motn retble 9/4/73, 10:00 AM & motn of deft American Building Maintenance Ind. for S/J of dism & suggestion the crt lacks subj matter jurisdiction.
	Fld Deft Memo of pts/auth in support of deft's motn for S/J of dism & suggestions that crt lacks subj matter jurisdiction.
	Fld Deft. Affid of Jess E. Benton, Jr.
	Fld Deft Affid of Jess E. Benton, III
	Fld Deft Affid of Eugene Coil.
	Fld Deft Affid of Claudia Morgan.
	LODGED deft Findings of fact & conclusions of law.
	LODGED deft proposed S/J of dism in favor of deft American Building Maintenance Industries against pltf USA.
10/15/73	Fld USA memo in oppos to defts S/J motn.
	Fld USA Affid in support of governments memo in oppos to defts S/J motn.
10/18/73	Fld Deft Applic of American Building Maintenance Industries for an ex party ord ext ti & cont hrng, Affid of Anthonie M. Voogd & memo pursuant to local rule 3(j).

DATE	PROCEEDINGS
	Fld pltf Memo on defts req for a continuance.
10/18/73	MIN ORD: Over objects of cnsl for (ext ord hrg on defts mot for summ judgmt cont to 11/26/73, 10 am. Fur deft hv to 11/19/73 to reply to Govt's memo pts & authrs in oppos to deft's mot.
11/19/73	Fld deft Affid of Bud McKinney.
	Fld deft Affid of H. Robert Vance.
	Fld deft Affid of Sydney J. Rosenberg.
	Fld deft Affid of James J. Breen.
11/20/73	Fld deft Affid of Ted Childress.
	Fld deft reply memo of deft American Building Maintenance in support of its motn for S/J of dism & suggestion that crt lacks subj matter
11/27/73	Fld pltf memo in support of applic for ord cont hrng on defts S/J motn to 12/10/73.
	Fld pltf ORD (JWC) cont hrng on defts S/J motn retble 12/10/73; pltf may have to 12/3/73 to file statement of genuine issues; deft may have to 12/7/73 to fil response.
12/3/73	Fld pltf Statement of genuine issues.
12/7/73	Fld defts reply to pltfs statemnt of genuine issues.
12/10/73	MIN ORD: Hrg deft;s mot for summ judgmt and Crt takes under Submn.
12/12/73	Fld fndgs of fact & concl of law; Fld summary jdgmt of dismi in fv of deft American Building Maintenance Industries & agnst pltf United States of America & ord thereon dismg the action & that pltf take nothing on his complt & that sd deft recov its costs. (Ent 12/12/73) JS-6 mld cpys & ntfd prtys
12/21/73	Fld deft Notc of filing depos of Jess E. Benton, III. on 12/21/73.
	Fld DEPOSITION of Jess E. Benton, III tk on 9/1/72 w/Exhibits.
1/3/74	Fld deft Notice of filing od depos of John Lewis Barta on 1/2/74
1/7/74	Fld DEPOSITION of John Lewis Barta tk on 9/15/73.
2/7/74	Fld pltf's N/A of summy jdgmnt of dismi. w proof of ser.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, v. AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT.	Civil No. 71-55 JWC Filed: 1/8/71 *Complaint*

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above named defendant, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendant under Section 15 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 25), commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 7 of the Clayton Act (15 U.S.C. § 18).

2. American Building Maintenance Industries transacts business and is found within the Central District of California.

II

3. As used herein:
   (a) "Southern California" refers to the area encompassed by Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara and Ventura Counties in the State of California; and
   (b) "Los Angeles area" refers to that part of Southern California bounded generally on the north by Oxnard, on the south by San Clemente, on the east by Fullerton, Pomona, Covina and Azusa, and on the west by the Pacific Ocean.

III

4. American Building Maintenance Industries (herein referred to as "ABMI") is hereby made the defendant herein. ABMI is a corporation organized and existing under the laws of the State of California and has its principal place of business at San Francisco, California. Each reference herein to ABMI shall include its subsidiary and affiliated corporations.

IV

Nature of Trade and Commerce

5. ABMI is one of the largest sellers of janitorial services in the United States with total revenues in 1969 of $64,720,480, of which janitorial services accounted for $52,431,984. American Building Maintenance Companies (ABMI's janitorial services division) has 56 branches serving more than 500 communities throughout the United States and Canada. In Southern California, ABMI's janitorial services facilities are located in Los Angeles, Long Beach and Santa Ana. ABMI is the largest seller of janitorial services in Southern California with sales in 1969 of $10,922,395, or approximately 10 percent of the sales of janitorial services in the Southern California market.

6. At the time of the acquisition and merger hereinafter described, J. E. Benton Management Corporation and Benton Maintenance Company (herein referred to collectively as "Benton") were each corporations organized and existing under the laws of the State of California. At said time, Benton was engaged in the janitorial services, real estate and building management businesses and operated in Southern California in the Los Angeles area. In 1969, Benton's sales of janitorial services totalled $7,243,000, making it the fourth largest seller of such services in Southern California with almost 7 percent of the sales in said market.

7. Janitorial services contracting companies, including ABMI, offer to sell and sell their services primarily to landlords, managing agents and tenants of commercial, industrial and institutional buildings. These services may include, but are not limited to: general cleaning; sweeping and dusting; stripping, waxing and polishing floors; carpet vacuuming and shampooing; trash removal; venetian blind

cleaning and repairing; washing of floors and walls; furniture cleaning, polishing and refinishing; elevator operating; and porter work.

8. In connection with its janitorial services contracting business, ABMI maintains offices and serves customers in various states of the United States. Both ABMI and Benton have purchased and received substantial quantities of janitorial supplies that have been shipped and transported across state lines and in interstate commerce. Janitorial services customers of ABMI and Benton have regularly engaged in commerce among the several states of the United States.

V

Offense Alleged

9. On or about June 30, 1970, ABMI acquired J. E. Benton Management Corp. and Benton Maintenance Company was merged into American Building Maintenance Company of California, a wholly-owned ABMI subsidiary.

10. The effect of the aforesaid acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in Southern California and in the Los Angeles area, in violation of amended Section 7 of the Clayton Act, in the following ways, among others:

a. Actual and potential competition between ABMI and Benton has been eliminated;
b. Benton has been eliminated as a substantial factor in competition;
c. ABMI has increased in relative size to such a point that its advantage over its competitors threatens to be decisive; and
d. Concentration in the sale of janitorial services has been increased to the detriment of actual and potential competition.

Prayer

WHEREFORE, the plaintiff prays:

1. That the acquisition and merger described in paragraph 9 of this complaint be adjudged a violation of amended Section 7 of the Clayton Act;

2. That ABMI be required to divest itself of the janitorial services contracting business of J. E. Benton Management Corp. and of Benton Maintenance Company which was merged into its wholly-owned subsidiary, American Building Maintenance Company of California;

3. That the plaintiff have such other and further relief as the nature of the case may require and which the Court may deem just and proper; and

4. That the plaintiff recover the costs of this suit.

Dated: January 7, 1971.

JOHN N. MITCHELL
Attorney General

RICHARD W. MCLAREN
Assistant Attorney General

BADDIA J. RASHID

/s/ James J. Coyle
JAMES J. COYLE
Attorneys, Department of Justice

/s/ Michael J. Dennis
MICHAEL J. DENNIS
Attorney, Department of Justice

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

ANSWER TO COMPLAINT

Filed: April 7, 1971

Defendant, American Building Maintenance Industries, answers the complaint as follows:

First Defense

1. The complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Defendant admits:

That plaintiff purports to bring its action within the statutes referred to in the complaint;

That defendant is a corporation organized and existing under the laws of the State of California and has its principal place of business at San Francisco, California; and transacts business and is found within the Central District of California;

That defendant is one of many sellers of janitorial services in the United States;

That for the fiscal year ending October 31, 1969 defendant's total revenues were $64,072,480, of which maintenance services accounted for $52,431,984;

That in its janitorial service division defendant has 56 branches serving more than 500 communities throughout the United States and Canada;

That on or about June 30, 1970, ABMI acquired the stock of J. E. Benton Management Corporation, and Benton Maintenance Company was merged into American Building Maintenance Company of California, a wholly owned subsidiary of defendant;

That each of said latter corporations were organized and existing under the laws of the State of California and operated in Southern California;

That at the time of said acquisition J. E. Benton

Management Corporation was engaged in the building management and real estate business in the Los Angeles area and incident thereto provided certain janitorial services;

That at the time of said merger Benton Maintenance Company was engaged in the janitorial services business in the Los Angeles area.

That the revenues for the fiscal year ending February 28, 1970 of J. E. Benton Management Corporation from the rendering of janitorial, management, real estate and other services totaled $3,025,542;

That the revenues in 1969 of Benton Maintenance Corporation from the rendering of janitorial and other services totaled $5,007,378;

That ABMI offers to sell and sells janitorial services to landlords, managing agents and tenants of commercial, industrial and institutional buildings and to others;

That janitorial services may include general cleaning; sweeping and dusting; stripping, waxing, and polishing floors; carpet vacuuming and shampooing; trash removal; venetian blind cleaning and repairing; washing of floors and walls; furniture cleaning and polishing; elevator operating; and porter work; and

That defendant, Benton Maintenance Company, and J. E. Benton Management Corporation each have purchased and received janitorial supplies that have been shipped and transported across state lines.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of:

Allegations purporting to describe the activities, revenues or business of others.

4. Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

5. To the extent material to plaintiff's complaint, defendant is not and has not been the producer, manufacturer, distributor or seiler of any commodity. Plaintiff merely furnishes the labor of unskilled workers for the rendering of janitorial work. Such unskilled workers are freely available in large numbers to anyone desiring to furnish or desiring to have janitorial work done. Neither defendant nor anyone else is now able or has at any time been able to

restrict or restrain in any manner the availability of any workers for janitor work. Such workers have at all times been available without restriction or restraint. Such workers are available to all within the Los Angeles area, the Southern California area, or to anyone without those areas who may desire to or care to enter into the janitorial services businesses either from without or within the State of California. It is not now possible nor has it been possible for defendant alone or defendant with Benton Maintenance Company or J. E. Benton Management Corporation to restrain, restrict or hamper the use of janitor workers or the entry into janitorial work.

WHEREFORE, defendant prays:

1. That plaintiff take nothing by virtue of its complaint; and

2. For such further and other relief as may be proper in the promises.

DATED: April ...., 1971.

LAWLER, FELIX & HALL
MARCUS HATTSON
ANTHONIE M. VOOGD

By .....
Attorneys for Defendant
American Building Maintenance Industries

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

ANSWERS AND OBJECTIONS TO FIRST SET OF INTERROGATORIES PROPOUNDED TO PLAINTIFF BY DEFENDANT AMERICAN BULDING MAINTENANCE INDUSTRIES

Interrogatory No. 1

Describe the boundaries of the "Los Angeles area" as defined in paragraph 3(b) of the complaint with sufficient particularity to enable ABMI to delineate those boundaries on a map of Southern California.

Answer to Interrogatory No. 1

As stated in paragraph 6 of the complaint, the "Los Angeles area" is the area of operation of J. E. Benton Management Corp. and Benton Maintenance Company (hereinafter referred to collectively as "Benton"). On August 4, 1970, Mr. Allen M. Singer, Vice-President and Secretary, American Building Maintenance Industries, stated that Benton operated in Southern California as far north as Oxnard, south as far as San Clemente, east to Azusa, Covina, Fullerton and, at one time, as far as Pomona; said discussion was confirmed in Mr. Dennis' letter to Mr. Singer dated August 12, 1970; and in Mr. Singer's letter to Mr. Dennis dated September 9, 1970, he stated that "[a]t the time of the acquisition, Benton was doing work as far east as Azusa, as far south as San Clemente, and as far north as Ventura."

Interrogatory No. 2

State separately with respect to each of the subsidiary and affiliated corporations of ABMI referred to in paragraph 4 of the complaint:

a. Its name and address;

b. Whether it is a "seller of janitorial services" as that term is used in paragraph 5 of the complaint;

c. Whether it is a "janitorial service contracting com-

pany" as that term is used in paragraph 7 of the complaint;

d. Whether its revenues in 1969 were included in the figure of $64,720,480 referred to in paragraph 5 of the complaint, and, if so, the amount of its revenues so included;

e. Whether its revenues in 1969 were included in the figure $52,431,984 referred to in paragraph 5 of the complaint, and, if so, the amount of its revenues so included; and

f. Identify all documents which were the source of, or from which you derived, the information provided in your answers to the foregoing subparagraphs a. through e.

Answer To Interrogatory No. 2

The information requested in the foregoing Interrogatory No. 2 (a. through f.) may be found in Exhibit "A" submitted by Mr. Allen M. Singer in response to the following question contained in a letter from Michael J. Dennis to American Building Maintenance Industries (referred to as ABMI), dated July 13, 1970:

"(1) Please state the correct corporate name, mailing address, state and date of incorporation, description of the business and the geographic area of operation of ABMI and each of its subsidiaries or affiliates."

Plaintiff relied on statements made by Mr. Singer and has no other information regarding the identity or revenues of any of the affiliated or subsidiary corporations of defendant ABMI.

Interrogatory No. 3

State separately with respect to each seller of janitorial services with which ABMI is compared in the first sentence of Paragraph 5 of the Complaint:

a. Its name and address;
b. Its principal place of business;
c. The location of each of its facilities used in the sale of janitorial services;
d. Each of the janitorial services provided by it;
e. The section or sections of the country where it sold janitorial services in 1969;

f. Its revenues in 1969;
g. Its revenues in 1969 from the sale of janitorial services;
h. Its revenues in 1969 from the sale of janitorial services in the Los Angeles area;
i. Its revenues in 1969 from the sale of janitorial services to landlords, managing agents and tenants of commercial, industrial and institutional buildings located in the Los Angeles area;
j. Its revenues in 1969 from the sale of janitorial services in southern California;
k. Its revenues in 1969 from the sale of janitorial services to landlords, managing agents and tenants of commercial, industrial and institutional buildings located in Southern California;
l. Whether it is a "seller of janitorial services" as that term is used in paragraph 5 of the complaint;
m. Whether it is a "janitorial service contracting company" as that term is used in paragraph 7 of the complaint;
n. Whether in 1969 it was an actual competitor of ABMI in the sale of janitorial services in Southern California;
o. Whether in 1969 it was an actual competitor of ABMI in the sale of janitorial services in the Los Angeles area;
p. Whether in 1969 it was a potential competitor of ABMI in the Southern California area;
q. Whether in 1969 it was a potential competitor of ABMI in the Los Angeles area;
r. Identify all documents which were the source of, or from which you derived, the information given in your answers to the foregoing subparagraphs a. through q. of this interrogatory.

Answer To Interrogatory No. 3

(1) a. Allied Maintenance Corp. (Co. has 59 wholly-owned and four 50 per cent-owned subsidiaries in the United States and Canada.)
b. 2 Pennsylvania Plaza, New York, New York 10001.
c. Unknown.
d. Maintenance and cleaning of department stores, airline, bus and railroad terminals, sports sta-

diums and other structures. Janitorial services for business enterprises and Government agencies.

e. Unknown.
f. 1969 operating revenues, $50,766,800.
g. through k. Unknown.
l. and m. Yes.
n. and o. Yes.
p. and q. Yes.
r. The source of the information given in the answer to the foregoing subparagraphs a. through q. may be found in Documents (1), (2) and (3), as described in Exhibit "B" attached hereto.

(2) a. Kinney National Service, Inc. (many subsidiaries, including eight specifically listed under "Building Services" in Document 1 described in Exhibit "B" attached hereto.
b. 10 Rockefeller Plaza, New York, New York 10020.
c. Building Service Group is engaged in cleaning and maintenance services in New York City area upstate New York, California, Connecticut, Georgia, Illinois, Massachusetts, Missouri, New Jersey, Ohio, Pennsylvania, Virginia, and the District of Columbia.
d. Cleaning and maintenance of buildings.
e. Los Angeles area, California, Connecticut, Georgia, Illinois, Massachusetts, Missouri, New Jersey, Ohio, Pennsylvania, Virginia, the District of Columbia, New York City area, and upstate New York.
f. Kinney National Service, Inc.-Building Services Group operating revenues fiscal year ended 9-30-69, $124,884,000.
g. Unknown.
h. National Cleaning Company, Division of Kinney National Service of California, Inc., 1969 revenues for janitorial service in Los Angeles area was $8,000,000 to $9,000,000 (est. $8,500,000).
i. through k. Unknown.
l. through q. Yes.
r. The source of the information given in the answer to the foregoing subparagraph may be found in Documents (1), (2), (3) and (4), as described in Exhibit "B" attached hereto.

(3) a. Prudential Building Maintenance Corp. (29 wholly-owned subsidiaries).
b. 1430 Broadway, New York, New York 10018.
c. New York City, Chicago, Los Angeles.
d. Cleaning and maintenance and other services for office buildings, hotels, factories, stores and other commercial and institutional space.
e. New York City area, Chicago area, Los Angeles area.
f. Service Revenues, 1969, $44,895,780.
g. through k. Unknown.
l. through q. Yes.
r. The source of the information given in the answer to the foregoing subparagraphs may be found in Documents (1), (2), (3) and (4), as described in Exhibit "B" attached hereto.

Interrogatory No. 4

State with respect to the term "janitorial services" used in paragraphs 5, 6, 7, 8, and 10 of the complaint:

a. Whether parking service is a janitorial service;
b. Whether building security service is a janitorial service;
c. Whether grounds maintenance service such as gardening is a janitorial service;
d. Whether elevator repair service is a janitorial service;
e. Whether lighting fixture cleaning service is a janitorial service;
f. Whether pest control service is a janitorial service;
g. Whether the provision of dust control mats and equipment is a janitorial service;
h. Whether the provision of linens is a janitorial service;
i. Whether air conditioning maintenance service is a janitorial service;
j. Whether window cleaning service is a janitorial service;
k. Whether drapery cleaning service is a janitorial service;
l. Whether lighting bulb or tube replacement service is a janitorial service;
m. Whether industrial landscaping service is a jani-

torial service;

n. Whether doorman service is a janitorial service;

o. Whether building directory service is a janitorial service;

p. Whether metal polishing service is a janitorial service;

q. Whether residential cleaning service is a janitorial service;

r. Whether building management service is a janitorial service;

s. Whether garage service is a janitorial service;

t. Whether the term janitorial services includes any service other than those named in the foregoing subparagraphs a. through s. and those named in paragraph 7 of the complaint, and if so, the name and nature of each such other service.

Answer To Interrogatory No. 4

a. and b. No.
c. Unknown.
d. No.
e. Yes.
f. and g. No.
h. Unknown.
i. No.
j. Yes.
k. through l. Unknown.
m. through p. Unknown.
q. No.
r. No.
s. Plaintiff is unable to answer without a definition of "garage service."
t. Plaintiff knows only that restroom cleaning is another janitorial service included in the term "janitorial services." Plaintiff does not have sufficient knowledge to say whether or not the term "janitorial services" includes any other services.

Interrogatory No. 5

State with respect to the janitorial services referred to in paragraph 7 of the complaint:

a. Whether there are services which are interchangeable with the services referred to in paragraph 7;

b. Describe the services which are so interchangeable;

c. If you have excluded any services as interchangeable which were excluded on the basis of price, quality or use, describe the reasons for such exclusion in terms of price, quality and use;

d. Identify all documents which were the source of, or from which you derived, the information given in your answers to the foregoing subparagraphs a. through c. of this interrogatory.

Answer To Interrogatory No. 5

a. Plaintiff has no knowledge of the existence of any services which are interchangeable with janitorial services.

Interrogatory No. 6

Identify all documents upon which you base the allegation in paragraph 5 of the complaint that the total revenues of ABMI in 1969 were $64,720,480.

Answer To Interrogatory No. 6

The source of the information requested by the foregoing Interrogatory No. 6 is:

American Building Maintenance Industries' Annual Report of 1969 (5 year Financial Review data shown on inside front cover).

Interrogatory No. 7

Identify all documents upon which you base the allegation in paragraph 5 of the complaint that the revenues of ABMI in 1969 for janitorial services were $52,431,984.

Answer To Interrogatory No. 7

The source of the information requested by the foregoing Interrogatory No. 7 is:

ABMI's Annual Report of 1969 (Consolidated Statement of Income, year ended October 31, 1969 and 1968, Page 12).

Interrogatory No. 8

Identify all documents upon which you base the allegation in paragraph 8 of the complaint that ABMI has janitorial services facilities in Long Beach and Santa Ana.

Answer To Interrogatory No. 8

Exhibit "A", a copy of which is attached hereto, provides the information requested in Interrogatory No. 8.

Interrogatory No. 9

State separately as to each seller of janitorial services in Southern California with which ABMI is compared in the last sentence of paragraph 5 of the complaint (other than sellers of janitorial services named in your answer to the foregoing Interrogatory No. 3) each of the matters referred to in subparagraphs a. through r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 9

(1) a. Pierose Building Maintenance Co.
b. 1401 W. 8th Street, Los Angeles, California.
c. 1401 W. 8th Street, Los Angeles, California.
d. Unknown.
e. Los Angeles area, Southern California.
f. Unknown.
g. through k. $8,900,000.
l. through q. Yes.
r. The source of the information given in the answer to the foregoing subparagraphs a. through q. may be found in Documents (1), (5) and (6), as described in Exhibit "B" attached hereto.

(2) a. White Glove Building Maintenance, Inc.
b. 5285 W. Washington Boulevard, Los Angeles, California 90016.
c. 5285 W. Washington Boulevard, Los Angeles, California 90016.
d. Unknown.
e. Los Angeles area, Southern California.
f. Unknown.
g. $5,564,925.
h. $5,564,925.

i. through k. Unknown.
l. through q. Yes.
r. The source of the information given in the foregoing subparagraphs a. through q. may be found in Document (7), as described in Exhibit "B" attached hereto.

Interrogatory No. 10

Identify all documents upon which you base the allegation in paragraph 5 of the complaint that the sales of janitorial services in the Southern California market by ABMI in 1969 were $10,922,395.

Answer To Interrogatory No. 10

The source of the information requested in Interrogatory No. 10 are letters dated September 9, 1970 and October 21, 1970, from Allen M. Singer, Vice-President and Secretary, American Building Maintenance Industries, to Michael J. Dennis, copies of which are attached and marked Exhibits "C" and "D", respectively.

Interrogatory No. 11

State with respect to the sale of janitorial services in the Southern California market referred to in paragraph 5 of the complaint:

a. The total amount of such sales in 1969;

b. Identify all documents which were the source of, or from which you derived, the information given in your answer to the foregoing subparagraph a; and

c. State the name and address of each person who was the source of the information given in your answer to the foregoing subparagraph a.

Answer To Interrogatory No. 11

a. The total amount of sales of janitorial services in the Southern California area for the year 1969 was approximately $100,000,000.

b. The source of the information given in the foregoing subparagraph a. is: *The United States Bureau of the Census, Census of Business, 1967, Selected Services: California, BC67-SA6.* A copy of this volume is in the office of the Antitrust Division, 1315 United States Court

House, 312 North Spring Street, Los Angeles, California 90012. Copies may also be obtained from the U. S. Government Printing Office, Washington, D. C.

c. Additional information was supplied by the following persons:

(1) Mr. A. H. Wittenberg, Jr.,
3500 West First Street
Los Angeles, California
(2) Hr. Harold Connor
3500 West First Street
Los Angeles, California
(3) Mr. Allen M. Singer
333 Fell Street
San Francisco, California

Interrogatory No. 12

State with respect to J. E. Benton Management Corporation prior to the alleged merger and acquisition:

a. Whether it was a "seller of janitorial services" as that term is used in paragraph 5 of the complaint;

b. Whether it was a "janitorial service contracting company" as that term is used in paragraph 7 of the complaint;

c. The nature of the real estate business conducted by it;

d. The nature of the building management business conducted by it;

e. Whether or not you made any determination that it was a particularly disturbing, disruptive or otherwise unusually competitive factor in the market for janitorial services;

f. If your answer to the foregoing subparagraph e. is in the affirmative, state what the determination was and the facts used in arriving at that determination;

g. Whether or not you made any determination that it had an unusual competitive potential in the market for janitorial services;

h. If your answer to the foregoing subparagraph g. is in the affirmative, state what the determination was and the facts used in arriving at that determination;

i. Whether you determined that absent the merger referred to in paragraph 9 of the complaint, it was likely to

have had a substantial competitive influence in the market for janitorial services;

j. If your answer to the foregoing subparagraph i. is in the affirmative, state the determination so made and the factors included in arriving at that determination;

k. Identify all documents which were the source of, or from which you derived, the information given in your answers to the foregoing subparagraphs a. through j. of this interrogatory.

Answer To Interrogatory No. 12

a. and b. Yes.

c. and d. Plaintiff has no knowledge as to the nature of the real estate business or the building management business of J. E. Benton Management Corp. prior to the merger.

e., g. and i. Plaintiff made no such determination as prior to the merger. Moreover, it is irrelevant whether or not plaintiff made such determinations.

f., h. and j. Not applicable.

Interrogatory No. 13

State with respect to Benton Maintenance Company prior to the alleged merger and acquisition each of the matters referred to in subparagraphs a., b. and e. through k. of the foregoing Interrogatory No. 12.

Answer To Interrogatory No. 13

In response to subparagraphs a. and b., plaintiff knows only that at the time of the acquisition Benton Maintenance Company was engaged in the janitor service business in the Los Angeles area.

In response to subparagraph e., plaintiff made no such determinations prior to the alleged merger and acquisition.

The source of the information given in response to subparagraphs a. and b. is Exhibit "E", a copy of which is attached.

Interrogatory No. 14

State separately with respect to each seller of janitorial services with which the sales of Benton were compared in the last sentence of paragraph 6 of the complaint (other

than sellers of janitorial services named in your answers to the foregoing Interrogatories Nos. 3 and 9) each of the matters referred to in subparagraphs a. through r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 14

All sellers of janitorial services compared with Benton are as stated in the answers to the foregoing Interrogatories Nos. 3 and 9.

Interrogatory No. 15

Is there any difference between a "janitorial services contracting company" as that term is used in paragraph 7 of the complaint and a "seller of janitorial services" as used in paragraph 5 of the complaint?

Answer To Interrogatory No. 15

No. The term "seller of janitorial services" as used in paragraph 5 of the complaint refers to the sale of janitorial services on a contract basis by ABMI, one of the largest janitorial services contracting companies.

Interrogatory No. 16

If the answer to the foregoing Interrogatory No. 15 is in the affirmative state:

a. Whether the difference is based on the *type of the business entity* providing janitorial services (whether it be a corporation, a sole proprietorship, a partnership or other form of business entity), and, if so, state the types of the entities which are sellers of janitorial services and the types of entities which are janitorial services contracting companies;

b. Whether the difference is based on *size*, and, if so, state the annual revenues and assets of sellers of janitorial services and the annual revenues and assets of janitorial services contracting companies;

c. Whether the difference is based on the *nature of the agreement* whereby janitorial services are provided (whether it be the monthly amount to be paid pursuant to the agreement, the term of the agreement or any other provision of the agreement), and, if so, state the provisions of the agreements used by sellers of janitorial service and the provisions of the agreements used by janitorial services contracting companies;

d. Whether the difference is based upon *annual revenues* from janitorial services, and if so, state the annual revenues from janitorial services of sellers of janitorial services and the annual revenues from janitorial services of janitorial service contracting companies;

e. Whether the difference is based on the *kind of janitorial services* provided, and, if so, state the kinds of janitorial services provided by sellers of janitorial services and the kinds of janitorial services provided by janitorial services contracting companies;

f. Whether the difference is based on the fact that janitorial service contracting companies provide a certain *mix or range of janitorial services,* and, if so, state each of the janitorial services included in that mix or range;

g. Whether the difference is based on *nature of customers,* and, if so, state the nature of customers of sellers of janitorial services and the nature of customers of janitorial services contracting companies;

h. Whether the difference is based on any *other criteria,* and, if so, state the nature of each such criterion and how and in what manner sellers of janitorial services and janitorial services contracting companies;
such criterion; and

i. Whether janitorial services contracting companies include companies which provide janitorial services only as an incident to or together with the sale of other services.

Answer To Interrogatory No. 16

Not applicable.

Interrogatory No. 17

State separately with respect to each janitorial services contracting company as that term is used in paragraph 7 of the complaint doing business in Southern California (other than seller of janitorial services named in your answers to the Interrogatories Nos. 3, 9 and 14) each of the matters referred to in subparagraphs a. through r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 17

Not applicable.

Interrogatory No. 18

State and define with respect to the allegations of paragraph 10 of the complaint:

a. Each "line of commerce" in which you assert that the acquisition and merger may have the effect of substantially lessening competition;

b. Each "line of commerce" in which you assert that the acquisition and merger may have the effect of tending to create a monopoly;

c. As to each "line of commerce" referred to in your answer to the foregoing subparagraph a. of this interrogatory, the "section of the country" in which you assert the aforesaid acquisition and merger may have the effect of substantially lessening competition;

d. As to each "line of commerce" referred to in your answer to the foregoing subparagraph b. of this interrogatory, the section of the country in which you assert the aforesaid acquisition and merger may have the effect of tending to create a monopoly.

Answer To Interrogatory No. 18

Subparagraphs a. and b. The line of commerce in which said effects may occur or have occurred is the sale of "Janitorial Services." As stated in paragraph 7 of the complaint, janitorial services may include, but is not limited to, general cleaning; sweeping and dusting; stripping, waxing, and polishing floors; carpet vacuuming and shampooing; trash removal; venetian blind cleaning; washing of floors and walls; furniture cleaning and polishing; elevator operating; and porter work.

Paragraph 7 of the complaint further states that such janitorial services are customarily sold by janitorial services contracting companies to landlords, managing agents and tenants of commercial, industrial and institutional buildings.

c. and d. The sections of the country where the aforesaid acquisition and merger may have said effects are Southern California and the Los Angeles area. "Southern California" is defined as the nine counties of Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara, and Ventura. "Los Angeles area" is defined as that part of Southern California bounded generally on the north by Oxnard, on the east by Fullerton, Pomona, Covina and Azusa, and on the west by the Pacific Ocean.

Interrogatory No. 19

State with respect to paragraph 10 of the complaint how and in what manner the effect of the acquisition and merger may be to substantially lessen competition in the sale of janitorial services in Southern California.

Answer To Interrogatory No. 19

The effect of the acquisition and merger may be to substantially lessen competition, or tend to create a monopoly, in the sale of janitorial services in Southern California and in the Los Angeles area, in violation of amended Section 7 of the Clayton Act, in the following ways, among others:

(a) Actual and potential competition between ABMI and Benton has been eliminated;

(b) Benton has been eliminated as a substantial factor in competition;

(c) ABMI has increased in relative size to such a point that its advantage over its competitors threatens to be decisive; and

(d) Concentration in the sale of janitorial services has been increased to the detriment of actual and potential competition. Plaintiff does not have sufficient knowledge at this time to state additional ways in which the acquisition and merger may have said effects.

Interrogatory No. 20

State with respect to paragraph 10 of the complaint how and in what manner the effect of the acquisition and merger may be to substantially lessen competition in the sale of janitorial services in the Los Angeles area.

Answer To Interrogatory No. 20

Same as response to the foregoing Interrogatory No. 19.

Interrogatory No. 21

State with respect to paragraph 10 of the complaint how and in what manner the effect of the acquisition and merger may be to tend to create a monopoly in the sale of janitorial services in Southern California.

Answer To Interrogatory No. 21

Same as response to the foregoing Interrogatory No. 19.

Interrogatory No. 22

State with respect to paragraph 10 of the complaint how and in what manner the effect of the acquisition and merger may be to tend to create a monopoly in the sale of janitorial services in the Los Angeles area.

Answer To Interrogatory No. 22

Same as response to the foregoing Interrogatory No. 19.

Interrogatory No. 23

Describe with particularity and in detail the "actual . . . competition between ABMI and Benton" referred to in paragraph 10a of the complaint which has been eliminated by the merger and acquisition.

Answer To Interrogatory No. 23

Actual competition between ABMI and Benton for janitorial services business in Southern California and in the Los Angeles area has been eliminated by reason of the elimination of a substantial competitor in the above-mentioned market.

Interrogatory No. 24

Describe with particularity and in detail the "potential competition between ABMI and Benton" referred to in paragraph 10a of the complaint which has been eliminated by the merger and acquisition.

Answer To Interrogatory No. 24

Potential competition between ABMI and Benton for janitorial services business in Southern California and in the Los Angeles area has been eliminated.

Interrogatory No. 25

Describe with particularity and in detail the nature of the competition from which Benton was eliminated as a substantial factor as alleged in paragraph 10b of the complaint.

Answer To Interrogatory No. 25

Benton was eliminated as a substantial factor in competition for janitorial services business in the Southern California and in the Los Angeles area.

Interrogatory No. 26

Describe with particularity and in detail the nature of ABMI's "advantage over its competitors" referred to in paragraph 10c of the complaint.

Answer To Interrogatory No. 26

ABMI has an advantage over its competitors for janitorial business in Southern California and in the Los Angeles area because it has increased in relative size as a result of the acquisition and merger.

Interrogatory No. 27

State with respect to the allegation in paragraph 10c of the complaint that ABMI's "advantage over its competitors threatens to be decisive" what is meant by a decisive advantage.

Answer To Interrogatory No. 27

A "decisive advantage" is an advantage that may substantially lessen competition or tend to create a monopoly.

Interrogatory No. 28

State separately as to each of the competitors of ABMI in Southern California referred to in paragraph 10c of the complaint (other than sellers of janitorial services named in your answers to the foregoing Interrogatories Nos. 3, 9, 14, and 17) each of the matters referred to in subparagraphs a. through r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 28

In drafting the allegations in paragraph 10c of the complaint, plaintiff had no specific knowledge of and, therefore, made no reference to, any sellers of janitorial services which it can name other than those named in answer to Interrogatories Nos. 3, 9, 14, and 17. Plaintiff does not doubt, however, that there are competitors over whom ABMI's advantage threatens to be decisive, concerning which plaintiff has no knowledge at this time.

Interrogatory No. 29

State separately as to each of the competitors of ABMI in the Los Angeles area referred to in paragraph 10c of the complaint (other than sellers of janitorial services named in your answers to the foregoing Interrogatories Nos. 3, 9, 14, 17, and 28) each of the matters referred to in subparagraphs a. through r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 29

Same as response to the foregoing Interrogatory No. 28.

Interrogatory No. 30

State the name and address of each seller of janitorial services or janitorial services contracting company which commenced doing business in Southern California between January 1, 1965 and December 31, 1970.

Answer To Interrogatory No. 30

The Antitrust Division of the United States Department of Justice has no knowledge of which sellers of janitorial services or janitorial services contracting companies, if any, commenced or ceased doing business in Southern California between January 1, 1965 and December 21, 1970, nor does it know whether or not any other division, department, branch or agency of the United States of America has such knowledge.

Interrogatory No. 31

State separately as to each seller of janitorial services or janitorial services contracting company which ceased doing

business in Southern California between January 1, 1965 and December 31, 1970, each of the matters referred to in subparagraphs a. through d. and r. of the foregoing Interrogatory No. 3.

Answer To Interrogatory No. 31

Not applicable.

Interrogatory No. 32

State separately with respect to each seller of janitorial services or janitorial services contracting company (other than Benton Maintenance Company or J. E. Benton Management Corporation) which sold janitorial services in Southern California and which was acquired by or merged into a seller of janitorial services or janitorial services contracting company during the period January 1, 1965 to December 31, 1970:

a. Its name;
b. The name of the janitorial services contracting company or seller of janitorial services which acquired it or with which it merged;
c. The date of the acquisition or merger;
d. Identify all documents which were the source of, or from which you derived, the information given in your answer to the foregoing subparagraphs a. through c. of this interrogatory.

Answer To Interrogatory No. 32

(1) a. California Building Maintenance Co.
b. Benton Maintenance Co.
c. December 31, 1968.
d. Document 1, Exhibit "B" attached hereto.

(2) a. National Cleaning Contractors, Inc.
b. Kinney Service Corp.
c. August 1966.
d. Page 2511 of document (1), Exhibit "B" attached hereto.

(3) a. State Maintenance Company.
b. Kinney Service Corp.
c. October 1965.
d. Page 1757 of document (2), Exhibit "B" attached hereto.

(4) a. Western Building Maintenance Company.
b. Kinney National Service, Inc.
c. December 1966.
d. Page 1757 of document (2), Exhibit "B" attached hereto.

(5) a. Coast Maintenance Co.
b. Kinney National Service, Inc.
c. April 1967.
d. Page 1757 of document (2), Exhibit "B" attached hereto.

(6) a. Santa Ana Building Maintenance.
b. American Building Maintenance.
c. February 1965.
d. See Exhibit "F" attached hereto.

(7) a. Long Beach Building Maintenance Company.
b. American Building Maintenance.
c. February 1965.
d. See Exhibit "F" attached hereto.

(8) a. Monarch Building Maintenance Co., Inc.
b. Prudential Building Maintenance Corp.
c. May 1968.
d. *Moody's Industrial Manual,* 1969, Moody's Investor's Service, Inc., 99 Church Street, New York 10007. This is a standard reference book, available in the Los Angeles Public Library.

Interrogatory No. 33

State separately with respect to each market affected by the merger referred to in paragraph 9 of the complaint:

a. Its nature;
b. Its geographic boundaries;
c. The factors used by you in determining that geographic market;
d. Whether there are any barriers to entry into such market;
e. Whether said merger created any barriers to such entry;
f. Describe separately each of the barriers referred to in your answers to the foregoing subparagraphs d. and e.;
g. Whether there have been any technological changes during the five year period preceding the filing of the complaint which affect the structure of such market;

h. If your answer to the foregoing subparagraph g. is in the affirmative, describe such technological changes;
i. Whether you have investigated, examined or determined the extent to which the demand for janitorial services in such market may be satisfied by hiring the labor for janitorial work without dealing with any seller of janitorial services or janitorial services contracting company;
j. If your answer to the foregoing subparagraph i. is in the affirmative, the results of each such investigation, examination and determination, and the factors and facts involved;
k. Whether you have investigated, examined or determined the factors which affect a customer making a choice between hiring his own labor force for janitorial work and dealing with a seller of janitorial services or a janitorial services contracting company in such market;
l. If your answer to the foregoing subparagraph k. is in the affirmative, the results of each such investigation, examination and determination, and the factors and facts involved;
m. Whether you have investigated, examined or determined the extent to which customers in such market are sensitive to price changes in the janitorial services contracting business;
n. If your answer to the foregoing subparagraph m. is in the affirmative, the results of each such investigation, examination and determination, and the factors and facts involved;
o. Whether you have investigated, examined or determined the economic or financial strength of defendant's competitors in such market;
p. If your answer to the foregoing subparagraph o. is in the affirmative, the results of each such investigation, examination and determination, and the factors and facts involved;
q. Whether you have made any economic surveys of such market;
r. If your answer to the foregoing subparagraph q. is in the affirmative, describe such survey;
s. Whether you have determined that there have been increases in concentration in that market;
t. If your answer to the foregoing subparagraph s. is

in the affirmative, what acts or occurrences or events have contributed to or have caused such increases in concentration;

u. Whether the market has a product dimension;

v. If your answer to the foregoing subparagraph u. is in the affirmative, the nature of the product dimension, and the factors used in determining the product dimension; and

w. Identify all documents which were the source of, or from which you derived, the information given in your answers to the foregoing subparagraph a. through v.

Answer To Interrogatory No. 33

Response to subparagraphs a. through c.:

The merger of Benton Maintenance Company into the ABMI wholly owned subsidiary affected the janitorial services market within Southern California and within the Los Angeles area. Plaintiff does not have sufficient knowledge at this time to identify any other markets affected by said merger.

Southern California is composed of the six counties of Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara, and Ventura. The Los Angeles area is bounded generally on the north by Oxnard, on the south by San Clemente, on the east by Fullerton, Pomona, Covina, and Azusa, and on the west by the Pacific Ocean.

Southern California, as defined, was represented to plaintiff (see Exhibit "C") as being the area in which ABMI conducted a portion of its janitorial services business. The Los Angeles area, as defined, was represented to plaintiff (see Exhibit "D") as being the area in which Benton Maintenance Company conducted its janitorial services business.

Responses to subparagraphs d. e. and g.:

Plaintiff does not have sufficient information to answer.

Subparagraphs f. and h.: Not applicable.

Subparagraphs i. and k.: No.

Subparagraphs j. and l.: Not applicable.

Subparagraph m.: Yes.

Subparagraph n.: Plaintiff was not able to make a firm determination as a result of its investigation and examination on the question of whether price alone was the determining factor in the janitorial services contracting business in Southern California and in the Los Angeles area.

Subparagraph o.: No.

Subparagraph p.: Not applicable.

Subparagraphs q. and r.: The Antitrust Division of the United States Department of Justice has not made any economic surveys of the janitorial services market in Southern California, as defined, or in the Los Angeles area, as defined, if by "economic survey" is meant a polling of all competitors within said markets to determine their volume of sales, etc. Otherwise, the Antitrust Division knows only that the United States Department of Commerce, Bureau of the Census, periodically makes certain surveys of businesses within certain States, counties and metropolitan areas, among which are surveys of businesses in *Standard Industrial Classification No. 7349.*

Subparagraphs s. and t.: Yes, plaintiff is aware of the mergers and acquisitions recited in answer to the foregoing Interrogatory No. 32, which have contributed to or caused increases in concentration in the Southern California and in the Los Angeles area janitorial services markets.

Subparagraphs u. and v.: Yes, janitorial services in Southern California and in the Los Angeles area include general cleaning; sweeping and dusting; stripping, waxing and polishing floors; carpet vacuuming and shampooing; trash removal; venetian blind cleaning; washing of floors and walls; furniture cleaning and polishing; elevator operating; and porter work.

Subparagraph w.: See Exhibits "C" and "D" attached hereto.

Interrogatory No. 34

In determining to challenge the merger referred to in paragraph 9 of the complaint:

a. Did you apply any standards other than the sizes of the merging firm's market shares;

b. If so, state the standards applied and the facts indicating the application of such standards; and

c. Identify all documents used in making that determination and all documents referring to that determination, and all documents referring to the standards and factors used in that determination.

Answer To Interrogatory No. 34

Plaintiff objects to the foregoing interrogatory. The standards used by plaintiff in its decision to challenge a particular merger is not relevant to any issues in this case. It also calls for information which does not relate to matters which can be inquired into under Rule 26(b) of the *Federal Rules of Civil Procedure.*

Interrogatory No. 35

State:

a. The date on which you first learned of the merger and acquisition referred to in paragraph 9 of the complaint;

b. How or in what manner or from what source you first learned of the merger and acquisition referred to in paragraph 9 of the complaint;

c. The date on which you determined for the first time to challenge the legality of the merger and acquisition referred to in paragraph 9 of the complaint;

d. Whether or not you at any time prior to the service of the complaint notified defendants that you had determined to challenge the legality of the said merger and acquisition; and

e. If your answer to the foregoing subparagraph d. is in the affirmative, identify all documents constituting or referring to any such notification to defendant.

Answer To Interrogatory No. 35

Plaintiff objects to the foregoing interrogatory. The date and manner in which plaintiff learned of this merger; the date plaintiff decided to file suit; and the time and manner in which plaintiff notified defendant of its intention to file such suit are irrelevant to any issues in this case.

Interrogatory No. 36

State with reference to paragraph 2 of the prayer of the complaint:

a. Whether or not you are able to list the assets, divestiture of which by defendant will satisfy said paragraph 2 of the prayer of the complaint; and

b. If your answer to the foregoing subparagraph a. is in the affirmative, list said assets.

Answer To Interrogatory No. 36

a. Plaintiff at this time is unable to list the assets, divestiture of which by defendant will satisfy paragraph 2 of the prayer of the complaint.

b. Not applicable.

Interrogatory No. 37

State with regard to janitorial services used by plaintiff, or any of its divisions, departments, branches or agencies:

a. The total number of employees of plaintiff performing janitorial services in the Los Angeles area;

b. The total number of employees of plaintiff performing janitorial services in the Southern California area;

c. Whether any division, department, branch or agency of plaintiff provides janitorial services to any other division, department, branch or agency in Southern California pursuant to any governmental rule or regulation;

d. If your answer to the foregoing subparagraph c. is in the affirmative, state the name of each such division, department, branch or agency and identify all documents constituting such rule or regulation;

e. State the name and address of the person employed by plaintiff personally responsible for the administration of janitorial services for plaintiff in Southern California;

f. State whether plaintiff has employed any seller of janitorial services or janitorial services contracting company to provide janitorial services for plaintiff in the Los Angeles area during the period commencing January 1, 1968 and ending June 1, 1970;

g. If the answer to the foregoing subparagraph f. is in the affirmative, state the name and address of each seller of janitorial services or janitorial services contracting company providing such services and identify all documents constituting contracts for such services;

h. The total square feet of building area for which janitorial services are provided for plaintiff in Southern California; and

i. The total square feet of building area for which janitorial services are provided for plaintiff in the Los Angeles area.

Answer To Interrogatory No. 37

It would be unduly burdensome for plaintiff to secure the information requested by the foregoing Interrogatory No. 37. However, Exhibits "G" and "H" attached and filed concurrently herewith represent a good faith effort on the part of plaintiff to comply with defendant's request.

Interrogatory No. 38

State separately with respect to each person interviewed by any representative of plaintiff with respect to the sale of janitorial services in Southern California:

a. His name;
b. His address;
c. The person, corporation with which he is associated or by whom he is employed;
d. The name of each person representing plaintiff who conducted each such interview, together with the divisions, departments, branches or agencies of plaintiff with whom that person was associated or employed;
e. The date or dates the interview was conducted;
f. Identify all documents evidencing what was stated at such interview.

Answer To Interrogatory No. 38

Plaintiff objects to this interrogatory. It calls for information which is irrelevant, unduly and unreasonably burdensome for plaintiff to produce. The names, addresses, company affiliations, etc. of all persons interviewed by representatives of the United States is not relevant to the subject matter of this litigation, nor is such information likely to lead to the discovery of relevant material.

Plaintiff also objects to this interrogatory in that it does not relate to matters which can be inquired into under Rule 26 of the *Federal Rules of Civil Procedure.*

Dated: July 12, 1971

/s/ Michael J. Dennis
MICHAEL J. DENNIS
Attorney, Department of Justice

(Jurat Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

NOTICE OF MOTION AND MOTION OF DEFENDANT AMERICAN BUILDING MAINTENANCE INDUSTRIES FOR SUMMARY JUDGMENT OF DISMISSAL AND SUGGESTION THE COURT LACKS SUBJECT MATTER JURISDICTION

[Rules 12(h)(3) and 56, F.R.C.P.]

TO PLAINTIFF UNITED STATES OF AMERICA AND TO THE DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, AND MICHAEL J. DENNIS, ITS ATTORNEYS:

PLEASE TAKE NOTICE that on Tuesday, September 4, 1973, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Jesse W. Curtis, Judge of the above entitled Court, defendant American Building Maintenance Industries will move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the above action for lack of subject matter jurisdiction.

Further, defendant suggests, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, that the Court lacks jurisdiction of the subject matter of the action.

This motion and suggestion are made upon the grounds that there is no genuine issue as to any material fact relating to jurisdiction and defendant is entitled to a judgment of dismissal as a matter of law.

This motion is based upon the Affidavits of Jess E. Benton, Jr., Jess E. Benton, III, Eugene Coil, and Claudia Morgan filed herewith, upon the memorandum of points and authorities filed herewith, and upon all the files and records of this action.

DATED: August 17, 1973

LAWLER, FELIX & HALL
MARCUS MATTSON
ANTHONIE M. VOOGD

By /s/ Anthonie M. Voogd
ANTHONIE M. VOOGD
Attorneys for Defendant
American Building
Maintenance Industries

DEFENDANT'S SUPPORTING AFFIDAVITS, FILED AUGUST 28, 1973:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF CLAUDIA MORGAN

CLAUDIA MORGAN, being first duly sworn, deposes and says:

1. I reside at 13614 Abana Drive, Cerritos, California 90701.

2. During the period of time between March 30, 1971 and June 9, 1971, I was employed by Kelly Girl and was assigned as a temporary employee to American Building Maintenance Company of California. During this period of time I reviewed certain records of J. E. Benton Management Corporation and Benton Maintenance Company located at the offices of American Building Maintenance Company of California, at 921 East 61st Street, Los Angeles, California 90035. The review of the records was conducted by me under the immediate supervision of Jess E. Benton, III, Director of Administration, Los Angeles Regional Office, American Building Maintenance Company of California.

3. The records reviewed by me included account ledger cards and other documents indicating all purchases made by J. E. Benton Management Corporation and Benton Maintenance Company from suppliers during the calendar year 1969 and the first six months of 1970. The review was made in order to respond to Interrogatory No. 16 of Plaintiff's First Set of Interrogatories to Defendant, which I have been informed were filed in this action on March 30, 1971. Interrogatory No. 16 inquired:

"With regard to the suppliers of Benton during the period January 1, 1968 to June 30, 1970, state as to each supplier:

(a) the name and address;
(b) the dollar amount and description of products supplied to Benton which were shipped from outside the State of California."

4. Attached hereto as Exhibits "A" through "D" are copies of the schedules prepared by me, which I understand were filed in response to Interrogatory No. 16. These schedules show suppliers and out-of-state purchases of the Benton companies as follows:

1. Exhibit "A": Benton Maintenance Company, January 1, 1969 through December 31, 1969.
2. Exhibit "B": Benton Maintenance Company, January 1, 1969 through June 30, 1970.
3. Exhibit "C": J. E. Benton Management Corporation, March 1, 1969 through February 28, 1970.
4. Exhibit "D": J. E. Benton Management Corporation, March 1, 1970 through June 30, 1970.

5. As more particularly appears from the schedules, the Benton Maintenance Company made no out-of-state purchases between January 1, 1969 and June 30, 1970. J. E. Benton Management Corporation made no out-of-state purchases between March 1, 1970 and June 30, 1970 and made the following out-of-state purchases between March 1, 1969 and February 28, 1970:

Matthew Bender Co. P.O. Box 658 Albany, New York 12201	$13.39	Real Estate Publications
Monarch Metal Products New Windsor New York 12550	$25.01	Reel Rack
Prentice Hall, Inc. Englewood Cliffs, New Jersey	$79.98	Income Tax Publication
Ready Made Sign Co. 1207 44th Avenue Long Island, New York 11001	$11.97	Sign Purchase

DATED: August 14, 1973.

/s/ Claudia Morgan
CLAUDIA MORGAN

(Jurat Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF EUGENE COIL

EUGENE COIL, being first duly sworn, deposes and says:

1. From January 1, 1967 to June 30, 1970, I was employed by Benton Maintenance Company as an assistant to G. V. Carr. During that period of time, Mr. Carr was the Treasurer of Benton Maintenance Company and the Treasurer of J. E. Benton Management Corporation. I was, and am, intimately acquainted with the accounting procedures of the Benton companies during that period of time.

2. J. E. Benton Management Corporation and Benton Maintenance Company maintained offices at 3727 West Olympic Boulevard, Los Angeles, California. The Pacific Telephone and Telegraph Company provided the Benton companies with telephone services through a single switchboard at these offices over telephone number 737-3220. These telephone services were billed to and paid by J. E. Benton Management Corporation. Benton Maintenance Company reimbursed J. E. Benton Management Corporation for its usage of the telephone services.

3. In the course of my duties I reviewed the bills submitted to J. E. Benton Management Corporation by The Pacific Telephone and Telegraph Company and approved them for payment. Additionally, I computed the amount Benton Maintenance Company would reimburse J. E. Benton Management Corporation for use of telephone services. Prior to June, 1969, Benton Maintenance Company reimbursed J. E. Benton Management Corporation fifty percent of all telephone services charges other than long distance charges; after June, 1969 and through June, 1970, this percentage was increased to sixty percent. The charges for all long distance calls made by Benton Maintenance Company were paid by that company to J. E. Benton Management Corporation.

4. Attached hereto as Exhibits "A" through "R" are true and correct copies of telephone bills rendered J. E. Benton Management Corporation by The Pacific Telephone

and Telegraph Company from January of 1969 through June of 1970, together with copies of checks submitted to The Pacific Telephone and Telegraph Company in payment of the bills and my worksheets relating to payment of the bills. The bills indicate the charges for out-of-state telephone calls and telegrams shown in the third column:

Date of Bill	*Total Amount of Bill*	*List of Out of State Telephone Calls and Telegrams*
January 25, 1969 (Exhibit A)	$ 798.16 all of which was paid.	None
February 25, 1969 (Exhibit B)	$ 792.41 of which $787.01 was paid	January 30, 1969 to Mingo Junction, Ohio, $1.70 (Misdialed number or billing error) February 15, 1969 to Kansas City, Missouri, $2.95 (Billing error) February 18, 1969 to Kansas City, Missouri, $0.75 (Billing error)
March 25, 1969 (Exhibit C)	$1,511.64 of which $1,484.85 was paid	March 5, 1969 to Kansas City, Missouri, $0.75 (Billing error) March 5, 1969 to Kansas City, Kansas, $1.80 (Billing error) March 5, 1969 to Kansas City, Kansas, $1.80 (Billing error) March 5, 1969 to Kansas City, Kansas, $3.15 (Billing error) March 5, 1969 to Kansas City, Kansas, $14.60 (Billing error) March 9, 1969 to Kansas City, Missouri, $2.55 (Billing error)
April 25, 1969 (Exhibit D)	$1,323.36 of which $1,319.21 was paid.	March 26, 1969 to Kansas City, Kansas, $2.60 (Billing error) April 7, 1969 to Albuquerque, New Mexico, $1.50 (Personal—G.V. Carr) April 8, 1969 to Las Vegas, Nevada, $1.30 April 21, 1969 to Duluth, Minnesota, $4.05 (Personal—Ivar Gustafson) April 21, 1969 to St. Paul, Minnesota, $1.55 (Billing error) April 8, 1969 to New York, New, York, $2.69 (Telegram)
May 25, 1969 (Exhibit E)	$1,134.13 of which $1,128.11 was paid.	May 12, 1969 to Las Vegas, Nevada, $1.30 (Personal—Jess E. Benton, III) May 21, 1969 to Altnl., Pennsylvania, $1.70 (Billing error)

Date of Bill	*Total Amount of Bill*	*List of Out of State Telephone Calls and Telegrams*
June 25, 1969 (Exhibit F)	$1,196.71 of which $1,190.69 was paid.	May 22, 1969 to Medford, Oregon, $7.05 (Billing error) June 3, 1969 to New York, New York, $1.80 (Telegram) June 6, 1969 to Philadelphia, Pennsylvania, $1.70 (Billing error)
July 25, 1969 (Exhibit G)	$1,168.94 of which $1,167.07 was paid.	July 10, 1969 to Topeka, Kansas, $3.00 (Personal—K. Nolan) July 11, 1969 to Buffalo, New York, $1.70 (Billing error)
August 25, 1969 (Exhibit H)	$1,146.11 all of which was paid.	July 23, 1969 to West Germany, $7.42 (Telegram, Personal—Jess E. Benton, III)
September 25, 1969 (Exhibit I)	$ 663.97 all of which was paid.	September 16, 1969 to Roseville, Michigan, $2.60
October 25, 1969 (Exhibit J)	$ 999.53 all of which was paid.	None
November 25, 1969 (Exhibit K)	$ 947.00 all of which was paid.	None
December 25, 1969 (Exhibit L)	$ 901.98 all of which was paid.	December 8, 1969 to New York, New York, $2.44 (Telegram)
January 25, 1970 (Exhibit M)	$ 924.90 all of which was paid.	None
February 25, 1970 (Exhibit N)	$ 991.27 all of which was paid.	February 24, 1970 to Las Vegas, Nevada, $1.20 (Personal—Eugene Coil)
March 25, 1970 (Exhibit O)	$ 946.93 all of which was paid.	March 19, 1970 to Las Vegas, Nevada, $1.30
April 25, 1970 (Exhibit P)	$1,000.86 all of which was paid.	April 7, 1970 to New York, New York, $1.35 April 17, 1970 to New York, New York, $1.80 April 17, 1970 to Oradell, New Jersey, $4.05
May 25, 1970 (Exhibit Q)	$ 888.59 all of which was paid.	None
June 25, 1970 (Exhibit R)	$ 974.21 all of which was paid.	June 1, 1970 to New York, New York, $1.80 June 11, 1970 to Mingo Junction, Ohio, $1.35 (Misdialed call)
TOTALS	$18,310.70 of which $18,260.45 was paid.	

5. With ten exceptions, the out-of-state telephone calls and telegrams indicated on the bills were totally unrelated to the business activities of the Benton companies, being:

a. *Calls involving erroneous billings:* On numerous occasions, unknown persons would make long distance calls, usually from public telephones, and charge the calls to telephone number 737-3230, the number for the Benton companies. Charges for these calls were deducted from the telephone bills and not paid. These calls are indicated on the above list by the words "billing error."

b. *Personal Calls:* On occasion, employees at the Benton companies would use the telephone service to place personal calls and reimburse J. E. Benton Management Corporation through me for the costs of the call. The calls are indicated on the above list by the word "personal" and the name of the person who placed the call.

c. *Telegram to West Germany:* I have read the Affidavit of Jess E. Benton, III, and am thereby advised that the July 23, 1973 telegram to West Germany was personal.

d. *Misdialed Calls:* The January 30, 1969 and June 11, 1970 calls to telephone number (614) 535-1230 in Mingo Junction, Ohio were misdialed attempts to call (714) 535-1230 in Anaheim, California, a frequently called telephone number. These calls are indicated on the above list by the words "misdialed call."

The remaining out-of-state calls and telegrams are listed below:

a. April 8, 1969 call to Las Vegas, Nevada, $1.30;
b. April 8, 1969 telegram to New York, New York, $2.69;
c. June 3, 1969 telegram to New York, New York, $1.80;
d. September 16, 1969 call to Roseville, Michigan, $2.60;
e. December 8, 1969 telegram to New York, New York, $2.44;
f. March 19, 1970 call to Las Vegas, Nevada, $1.30;
g. April 7, 1970 to New York, New York $1.35;
h. April 17, 1970 call to New York, New York, $1.80;
i. April 17, 1970 call to Oradell, New Jersey, $4.05;
j. June 1, 1970 call to New York, New York, $1.80;

Certain of these ten calls, particularly the calls to Las Vegas, may have been personal calls, calls involving erroneous billings or misdialed calls. The total amount billed for these ten calls was $21.13.

6. The Pacific Telephone and Telegraph Company provided Benton Maintenance Company with night line telephone services over telephone number 737-3611 at 3727 West Olympic Boulevard, Los Angeles, California. It also provided Benton Maintenance Company with telephone services over telephone number 790-2685 at the offices of its client, Jet Propulsion Laboratories, 4800 Oak Grove Drive, Pasadena, California 91103. Bills for these services were paid by Benton Maintenance Company.

7. In the ordinary course of business and as Assistant Comptroller of Benton Maintenance Company, I reviewed the bills rendered to that company by The Pacific Telephone and Telegraph Company before approving them for payment.

8. Attached hereto as Exhibits "S" through "Y" are true and correct copies of retained telephone bills for telephone services rendered Benton Maintenance Company by The Pacific Telephone and Telegraph Company. These bills indicate no out-of-state telephone calls were made over telephone numbers 737-3611 and 790-2685.

DATED: August 14, 1973.

/s/ Eugene Coil
EUGENE COIL

(Jurat Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF JESS E. BENTON, III

JESS E. BENTON, III, being first duly sworn, deposes and says:

1. In July of 1969 I was Assistant Secretary-Treasurer of J. E. Benton Management Corporation and the Assistant Secretary-Treasurer of Benton Maintenance Company.

2. In July of 1969 I was also a member of the Board of Directors of the Los Angeles Junior Chamber of Commerce which at that time was sponsoring the City of Los Angeles as a "Theme City" in the German American Volkfest to be held in Berlin, West Germany, from July 25, 1969 through August 10, 1969. I was the member of the Board of Directors responsible for matters relating to the Volkfest.

3. On July 23, 1969 I arranged for the sending of a telegram from the Los Angeles Junior Chamber of Commerce to the German American Volkfest in Berlin, West Germany. The arrangements for the sending of the telegram were made by me by telephone from the offices of the Benton companies located at 3727 West Olympic Boulevard, Los Angeles, California. I understand the costs of the telegraph appeared on the August 25, 1973 telephone bill submitted to J. E. Benton Management Corporation by The Pacific Telephone and Telegraph Company.

4. The telegram concerned the German American Volkfest only and was totally unrelated to the business activities of the Benton companies.

DATED: August 14, 1973.

/s/ Jess E. Benton, III
JESS E. BENTON, III

(Jurat and Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF JESS E. BENTON, JR.

JESS E. BENTON, JR., being first duly sworn, deposes and says:

Introduction

1. I am retired from active business and reside at 2728 Monte Mar Terrace, Los Angeles, California 90064. From 1936 to June 30, 1970, the date of the merger hereinafter referred to, I was employed by J. E. Benton Management Corporation, and from before 1950 to June 30, 1970 I was the President of that corporation. I was employed by Benton Maintenance Company as its President from 1958 to 1967 and as its Chairman of the Board and Chief Executive Officer from 1967 to June 30, 1970. I was, and am, intimately acquainted with the business and activities of the Benton corporations through June 30, 1970.

History of J. E. Benton Management Corporation

2. J. E. Benton Management Corporation was established during the national economic depression by my father, Jess E. Benton, and his partner, A. F. Ohl. The corporation was established by use of the corporate shell of Pacific Realty Securities Company, an inactive corporation organized under the laws of the State of California.

3. J. E. Benton Management Corporation was established for the express purpose of managing buildings and hotels which were assets of bankrupt corporations which had been reorganized under Section 77B of the Bankruptcy Act. Trustees in corporate reorganization proceedings did not wish to sell the buildings because of the depressed state of the real estate market. J. E. Benton Management Corporation provided trustees with building management services until such time as the real estate market improved and the building could be sold for a reasonable price.

4. Between 1936 and 1949 J. E. Benton Management Corporation provided management service for numerous

buildings under the control of corporate reorganization trustees. These management services included all services necessary for the operation of a building, such as rental of space, collection of rent, accounting, repair, alterations, engineering, and janitorial services. Subsequent to 1936 the company commenced selling management services to owners of buildings and apartments and also commenced engaging in the real estate business.

5. Between 1936 and June 30, 1970, J. E. Benton Management Corporation engaged in the real estate business and the business of providing building management, janitorial and related services. These were the only businesses the corporation engaged in during this period of time.

History of Benton Maintenance Company

6. Benton Maintenance Company was established by me in 1958 under the name of Affiliated Maintenance Company. The corporation was established by use of the corporate shell of S. W. Straus & Co., an inactive corporation organized under the laws of the State of California. The name Affiliated Maintenance Company was changed to Benton Maintenance Company in 1968.

7. Benton Maintenance Company was organized for the purpose of engaging in the business of selling janitorial services alone and apart from the sale of management services. It was not practicable for J. E. Benton Management Corporation to engage in this business. Janitorial services are frequently sold to building managers. A building manager might be unwilling to purchase janitorial services from J. E. Benton Management Corporation, believing that his position as building manager might be threatened.

8. Between 1958 and June 30, 1970, Benton Maintenance Company engaged in the business of selling janitorial and related services. This was the only business the corporation engaged in during this period of time.

Ownership of the Benton Companies

9. Prior to June 30, 1970 I owned all of the stock of J. E. Benton Management Corporation and eighty-five percent of the stock of Benton Maintenance Company. Ten percent of the Benton Maintenance Company stock was owned by my brother, Robert Benton. Ivar Gustafson, an officer of

the corporation, owned the remaining five percent of the stock.

10. Because of their differing corporate organization and ownership, the businesses of the Benton corporations were kept strictly separate with the following exceptions. Robert Benton, Jess E. Benton, III, G. V. Carr, and I were employed by both corporations. The purchase of janitorial supplies was sometimes jointly negotiated by both corporations but invoiced and paid separately. There was some borrowing of equipment between the corporations. Both corporations maintained their only offices at 3727 West Olympic Boulevard, Los Angeles, California. The two corporations used the same telephone switchboard at their offices, but divided the costs of telephone services. J. E. Benton Management Corporation paid the salary of the switchboard operator. Benton Maintenance Company paid the salaries of other office personnel who provided some service to J. E. Benton Management Corporation.

The Merger

11. On June 30, 1970, Benton Maintenance Company was merged into American Building Maintenance Company of California. Robert Benton, Ivar S. Gustafson and I received 75,000 shares of the common stock of American Building Maintenance Industries for our Benton Maintenance Company stock. On the same date American Building Maintenance Industries purchased all of the stock of J. E. Benton Management Corporation from me for $750,000.

12. I sold my interests in the Benton corporations to American Building Maintenance Industries because of my age and my desire to retire.

13. The businesses of the Benton corporations were conducted entirely within Los Angeles, Orange and Ventura Counties in California.

14. The Benton corporations had no manufacturing plants, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how, and no location or business situs advantage.

15. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally, is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.

16. All but an extremely small number of the suppliers of the Benton corporations were located within California.

17. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with its suppliers. There are no significant economies to be realized through bulk or quantity purchases of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial service. The basic service provided was the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of total amounts paid by customers for janitorial services.

18. The major suppliers of the Benton corporations were:

a. Ball Industries, El Segundo, California, which delivered industrial and janitorial equipment and supplies from its warehouse to the Benton corporations' warehouse at 3727 West Olympic Boulevard or to customer locations specified by the Benton corporations;

b. National Sanitary Supply Co., Los Angeles, California, which delivered paper goods and other janitorial supplies from its warehouse to the Benton corporations' warehouse or to customer locations specified by the Benton corporations;

c. U. S. Guards, Monterey Park, California, which provided the Benton corporations with building guard services on a subcontract basis; and

d. Courtesy Chevrolet Leasing, Los Angeles, California, which leased vehicles to the Benton corporations.

19. To the best of my recollection between 1965 and June 30, 1970 no officer or employee of J. E. Benton Management Corporation crossed a state line while engaged in business activities for that corporation; and between 1968 and June 30, 1970, no officer or employee of Benton Maintenance Company crossed a state line while engaged in business activities for that corporation.

20. The Benton corporations did not advertise nationally. They purchased advertising in the yellow pages of local telephone directories and distributed brochures describing their businesses to prospective customers.

Dated: August 16, 1973.

/s/ Jess E. Benton, Jr.
JESS E. BENTON, JR.

(Jurat and Certificate of Service Omitted in Printing)

APPENDIX A

Customers of Benton which were engaged in interstate or foreign commerce and which paid Benton more than $10,000 for services in 1969 included:

American Brass Mfg. Co.
Bank of America National Trust and Savings Association
Charles Luckman Associates (subsidiary of Ogden Corp.)
Collier Carbon and Chemical Corporation (subsidiary of Union Oil Company of California)
General Telephone Company of California
Great Western Savings & Loan Association
Hunt Foods
Hycon Manufacturing Company (subsidiary of McDonnell Douglas Corporation)
Insurance Company of North America
International Business Machines Corp.
Lincoln Savings & Loan Association
Lockheed Corporation
March & McLennan, Incorporated (subsidiary of Marlennan Corp.)
Minnesota Mining & Manufacturing Company
Mobil Oil Corp.
National Aeronautics and Space Administration (NASA Jet Propulsion Laboratory)
North American Aviation (now Rockwell International Corp.)
Pacific Telephone & Telegraph
Shell Oil Company
Teledyne, Inc.
Texaco, Inc.
Tishman Realty & Construction Co., Inc.
TRW, Inc.
Union Oil Company of California
Union Pacific Corporation
United Artists Corp. (subsidiary of Transamerica Corp.)
United California Bank
Van Camp Sea Food Co. (Div. of Ralston Purina)
Walston & Co.
Western Electric Company

Sources: Exhibits C, F & H filed by ABMI June 9, 1971, pursuant to Protective Order entered June 2, 1971.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVITS IN SUPPORT OF GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION

INDEX

I CUSTOMERS
- A. TRW, Inc. .....
- B. Jet Propulsion Laboratory .....
- C. Rockwell International ..... Plant Services Department
- D. Rockwell International .....
- E. Tishman Realty & Construction Co. .....
- F. General Telephone Company of California .....
- G. Pacific Telephone and Telegraph Company .....
- H. Mobil Oil Corporation .....
- I. Union Oil Company .....
- J. Texaco, Inc. .....
- K. Carnation Company .....
- L. Teledyne, Inc. .....

II SUPPLIERS
- A. Westinghouse Electric Corporation Elevator Division .....
- B. Metropolitan Water District .....
- C. Department of Water and Power Aqueduct Division .....
- D. Department of Water and Power ..... Power Operating and Maintenance Division
- E. Courtesy Chevrolet Co. .....
- F. Southern California Gas Company .....
- G. Ball Industries .....
- H. National Sanitary Supply Co. .....
- I. Crown Zellerbach .....

J. National Cash Register Company .....
K. Preferred Distributing Company .....
III COMPETITORS
A. Bekins Building Maintenance Co. .....
B. Los Angeles Building Maintenance Co. ...
C. ITT Service Industries Corporation .....
IV EXPERTS
A. Dr. Philip Neff .....
B. Dr. John D. Gaffey .....

I. CUSTOMERS

Affidavit of Charles V. Engle

Charles V. Engle, being first duly sworn, deposes and says:

1. I am presently employed as Director of Facilities for TRW, Inc., Systems Group (hereinafter TRW, Systems) and maintain offices at One Space Park, Redondo Beach, California. I have served in various supervisory capacities within the facilities department of TRW since March, 1961. I have responsibility for the general operation and maintenance of the TRW, Systems facilities in Redondo Beach. As part of my duties, I have been responsible for the initiation of requests for the purchase of contracted janitorial services. I have personal knowledge of the business activities of TRW and particularly of the activities carried on by TRW, Systems during the aforesaid period. I understand the important relationship between janitorial maintenance services and the overall operations of TRW.

2. TRW is a multi-national corporation engaged in systems engineering services and information services, and in the development and manufacture of jet engine components, space vehicle components, communication satellites and other spacecraft, electronic components and systems, industrial tools, bearings and fasteners. In 1969 and 1970, the company was initiating its efforts in areas such as microelectronics, holography and laser technology, the life sciences, avionics, computer software services, automated control systems and the application of systems engineering methods to civil and industrial markets. During this period TRW conducted one of the largest computer software operations in the world, processing as many as 600 complex

problems daily. In addition, TRW has developed records management systems for cities and counties; a land use information system for California; and an information recording system for a consortium of major oil companies.

3. In the Los Angeles area alone, TRW, Systems utilizes approximately 2.8 million sq. ft. of useful space. Many of the aerospace activities of TRW are centered in these facilities. Included among the many products and systems developed and assembled in these facilities during 1969 and 1970 were the Lunar Module back-up guidance system, attitude control engines and the Lunar Module Descent Engine for the Apollo series spacecraft which effected man's first landing on the moon; and various products for the Pioneer-Venus program. The huge manufacturing and assembly areas of TRW, Systems were also utilized in the manufacture and assembly of other spacecraft and spacecraft components. For example, during the aforesaid period Intelsat III, then the world's largest commercial communications satellite, was assembled and tested by TRW in its facilities in Redondo Beach including the laboratory known as the Environmental Simulation Chamber. In fact, by 1972 TRW had placed more than 100 spacecraft in the solar system. These products and the raw materials and components from which they were manufactured moved regularly in interstate commerce.

4. TRW, Systems has always contracted for the major portion of the janitorial maintenance of its facilities. With over two million square feet of manufacturing space in the Los Angeles area, TRW, Systems is one of the larger single space janitorial maintenance customers in the United States. Prior to its acquisition by ABMI, Benton performed the janitorial maintenance in the offices, laboratories and manufacturing areas which make up this facility. The maintenance requirements of this facility and the nature of the design, development and fabrication work performed therein require janitorial maintenance to be scheduled in careful coordination with production and other activities. These technically complex schedules are produced by computer and are dependent upon and work in support of production schedules. Similarly, we produce computerized schedules for purchasing, engineering, and management activities. We have found proper janitorial maintenance to be such a vital part of these operations that it must be sched-

uled and integrated into the overall operations of TRW. The janitorial contractor must have sufficient expertise to operate within the schedules. Indeed, only janitorial contractors with considerable work schedule experience are able to operate effectively within this system. TRW's purchasing, facilities and production personnel work in close cooperation with the management of the janitorial contractor. This close relationship is representative of the importance of the work of the janitorial maintenance contractor to TRW's manufacturing and distribution system.

5. Several of the areas maintained by Benton required exceptionally high maintenance quality. These areas included clean rooms; engineering and research laboratories; rooms containing electronic data processing equipment; and areas utilized in the fabrication and assembly of spacecraft and associated components. TRW, Systems operates several clean rooms in which spacecraft and aerospace components are assembled and tested. In order to eliminate dust contaminants from these clean rooms a laminar air circulation pattern is maintained and employees must take air showers and wear specialized clothing. The maintenance of these rooms is virtually a continuous operation and as a result Benton personnel worked side by side and in close cooperation with TRW scientists and technicians working therein. The fastidious cleaning of these rooms is, and was, a precondition of the testing and assembly operations carried on in these rooms. In TRW's research laboratories, maintained by Benton, a broad range of scientific experimentation and testing was performed. This work involved electronic, physical, chemical and laser research. The cleaning of these laboratories required meticulous attention to detail and particularly careful scheduling and coordination so that highly sensitive experiments could be carried on in the proper environment and to insure that they would not be disturbed in the cleaning operation. This coordination was affected through constant communication and cooperation between TRW and Benton personnel.

6. The maintenance of manufacturing and assembly areas within TRWs facilities requires a high degree of mutual assistance and coefficiency. In these areas, the maintenance and production schedules are highly interdependent. Moreover, the maintenance employee must handle and clean manufacturing equipment and provide a safe and clean environment for TRW employees. As a result, the maintenance operations play a vital part in the assembly and fabrication of products by TRW which subsequently move in interstate commerce.

7. Under the maintenance contract with TRW, Benton also removed various waste materials from TRW's laboratories, offices and manufacturing areas. These materials included packaging materials, cartons, waste paper and residue from manufacturing operations. Substantial quantities of these materials move directly to TRW from outside the State of California.

8. TRW's considerable computer facilities constitute another maintenance problem area. TRW relies heavily upon the effective operations of these computers and the maintenance of a dust free environment for these machines is critical to their effective operation. Dust accumulations are as disruptive as is improper programming by TRW personnel and are commonly more difficult to correct. Indeed, a minute piece of dust in a core unit of one of these machines can put it out of service. Benton's employees had sufficient experience and proficiency to deal with this problem.

9. In purchasing contracted janitorial services, TRW purchases a distinct group of services, the most important component of which is the management skill of the janitorial contractor. In addition, the janitorial contractor effects a substantial cost savings for TRW in performing this work as its wage rate and fringe benefit package is significantly lower than that of TRW.

10. A common decision in industrial management involves the decision between purchasing a product or service and fabricating or supplying it from within the company. This decision is commonly known as the Make-Buy decision. TRW maintains large machine shops in which various spacecraft components can be fabricated. Before doing so, however, TRW's cost for producing a component is tested against the price at which the product can be bought in the open market. Though several other factors are involved in the Make-Buy decision, price is often the most significant. Similarly, essential services are subject to such Make-Buy decisions. Even though TRW has a complement of construction and repair employees, we have found it cost effective in some cases to subcontract for this service. For janitorial maintenance, the significant cost savings and the expertise offered by the janitorial contractor have caused TRW to subcontract for this service. In terms of importance to

TRW's overall operations, there is no distinction between products and services that are purchased and products and services which are fabricated or supplied directly by TRW. We expect and require the subcontractor to adhere to the same quality specifications and the same scheduling and security regulations as TRW's own personnel. When the Buy decision is made and the product or service is supplied by others, it is quickly integrated into TRW's system of manufacture.

11. For several years prior to 1968, Benton performed the entire janitorial maintenance contract at TRW, Systems facilities in the Los Angeles area. We found them to be an exceptionally capable and efficient firm and had serious reservations when in 1969 ABMI underbid Benton and was awarded the contract. Our reservations were confirmed in our dissatisfaction with the work performed by ABMI. It appears that ABMI significantly underestimated the material requirements in the contract and were, therefore, constantly in search of a way to cut costs. This resulted in a general deterioration in the quality of the work performed.

12. Benton was a particularly strong competitor not only in providing high quality maintenance services but in the competitive bidding in response to TRW's invitations for bids. Their on-the-job supervision and management expertise was of an exceptionally high quality. As such, we were disappointed and concerned when we were informed that ABMI had acquired Benton. ABMI sought to quiet our concerns by assuring us that the Benton supervisory personnel and management would be retained. On the basis of our previous experience with ABMI, ABMI would not ordinarily have been awarded the contract to which they succeeded by acquiring Benton. We at TRW rely upon competition to assure alternate sources of supply at competitive prices. The acquisition of Benton by ABMI eliminated a strong and viable competitor in supplying contracted janitorial services to TRW and has represented a step away from a freely competitive market for contracted janitorial services.

/s/ Charles V. Engle
CHARLES V. ENGLE

(Jurat Omitted in Printing)

AFFIDAVIT OF RAYMOND HERNANDEZ

RAYMOND HERNANDEZ, being first duly sworn, deposes and says:

1. Continuously since approximately December, 1969, I have held my present position of Contract Negotiator for the Jet Propulsion Laboratory, 4800 Oak Grove Drive, Pasadena, California. The Jet Propulsion Laboratory is a division of the California Institute of Technology operating under two prime contracts with the United States Government, National Aeronautics and Space Administration (NASA). All of the facilities and equipment of the Laboratory are owned by NASA. The California Institute of Technology provides all necessary personnel for the design, development, assembly and/or manufacture of various pieces of space equipment on behalf of NASA. My duties as Contract Negotiator include responsibility for procuring janitorial maintenance services. I have personal knowledge of the activities of the Jet Propulsion Laboratory and the importance which janitorial maintenance contracting services play in these activities.

2. The activities of the Jet Propulsion Laboratory are interstate and international in character. The Laboratory is engaged in the research, development and manufacture of spacecraft, communications systems and support operations for the conduct of the unmanned exploration of space. In performing this function for NASA, the Jet Propulsion Laboratory performs a research and development function and subcontracts for the production of approximately 90 percent of the physical components of the spacecraft. Parties to these subcontracts are institutions and corporations found in many states of the United States. For example, in fiscal 1970 contracts with out-of-state institutions and corporations amounted to $58 million. All of the spacecraft components, some of which are produced at the Jet Propulsion Laboratory, are assembled at the Jet Propulsion Laboratory in Pasadena into the finished spacecraft. It is then transported to Cape Kennedy, Florida before its interplanetary journey. The Jet Propulsion Laboratory is clearly engaged in interstate commerce.

3. From January 1, 1970 through December 11, 1970, the Jet Propulsion Laboratory had in effect Contract No. 952696 with the Benton Maintenance Company which originally

provided for an authorized expenditure of $1.3 million and was ammended to authorize an expenditure of $2.15 under which Benton provided janitorial maintenance services to the Laboratory including assembly and manufacturing areas within the facility. (A copy of this contract secured from the files of the Jet Propulsion Laboratory is attached as part of this affidavit.) In addition to the services specified in Contract No. 952696, the Jet Propulsion Laboratory often called upon Benton to supply janitorial maintenance contracting services for special cleaning situations and in emergencies, known in the trade as "tag jobs."

4. Benton Maintenance Company also provided all material and equipment necessary to its performance under the contract. These supplies were purchased on behalf of the Laboratory and became the property of the United States upon receipt at the Laboratory.

5. The Jet Propulsion Laboratory depended upon the expertise of Benton in designing efficient and effective work routines which would improve upon those specified in the contract. In this regard Benton developed a system of allocating maintenance functions which considerably lowered the cost of this service while maintaining the necessary high quality. The development of this system was important to the continuing contractual relationship between NASA and the California Institute of Technology. The expertise in designing work routines is a valued expertise of the janitorial maintenance contractor.

6. The Jet Propulsion Laboratory under separate contracts periodically called upon Benton's specialized knowledge, capabilities and equipment to perform janitorial maintenance services in support of "clean rooms," specialized laboratories and the spacecraft assembly facility. These rooms and facilities maintain an extra level of cleanliness essential to the development and manufacture of highly technical scientific equipment. The development or assembly of scientific equipment in these rooms could have been seriously impaired by improper maintenance. This specialized cleaning is critical to the operation of these facilities. In addition Benton Maintenance performed janitorial maintenance services in support of other assembly and manufacturing areas within the NASA facility.

7. Pursuant to Contract No. 952696 Benton removed various waste materials from laboratory, office and assembly areas within the Laboratory. These materials included

small packaging materials, cartons as well as waste paper. Substantial quantities of these materials are believed to move directly to the Jet Propulsion Laboratory from outside the State of California.

8. The Jet Propulsion Laboratory is an enterprise engaged in interstate commercial activities. We awarded the contract to Benton to obtain its specialized knowledge, capabilities and expertise on the basis of meeting the conditions of our Invitation For Bids and Benton's low price. The services provided by Benton were an essential part of the integrated operations of the Laboratory. As such, Benton played an essential part in support of the Jet Propulsion Laboratory's role in the United States' exploration of space.

/s/ Raymond Hernandez
RAYMOND HERNANDEZ

(Jurat Omitted in Printing)

Affidavit of Charles W. Moxley

Charles W. Moxley, being first duly sworn, deposes and says:

1. Since September of 1965, I have served in various supervisory capacities within the Plant Services Department of North American Rockwell Corporation, 12214 Lakewood Boulevard, Downey, California. In February of 1973, the name North American Rockwell Corporation was changed to Rockwell International. For convenience North American Rockwell Corporation and Rockwell International subsequently will be referred to as Rockwell. As part of my duties, I have been responsible for the operations of the Plant Services Department of the Space Division of Rockwell and for the initiation of requests for the purchase of contracted janitorial services. I have knowledge of the business of Rockwell and particularly of the activities of the Space Division during the aforesaid period. I thoroughly understand the important relationship between janitorial maintenance services and the overall operations of Rockwell.

2. Rockwell is a national and multi-national corporation engaged in the design, engineering, development, production and interstate distribution of various products including automotive parts, single- and multi-engine aircraft, spacecraft, launch vehicles, ground support equipment, computers, radars and other electronic systems for aircraft and space vehicles, rocket engines, nuclear reactors and power systems, textile machinery and various components for industrial equipment. During the period January, 1969 through June 30, 1970, Rockwell maintained general offices in El Segundo, California. The computer facilities for the corporate operations of Rockwell in the western United States are maintained within the buildings occupied by the Space Division in Downey, California. These computer facilities provide electronic data processing for the design, development, production and interstate distribution of the products listed above.

3. During the period May, 1969 through June 30, 1970, the Space Division of Rockwell was engaged in interstate and international activities relating to the development and production of the Apollo command and service modules, the S-II stage of the Saturn Launch System and various

other components of space vehicles. In producing these products the Space Division occupied offices, laboratories and manufacturing facilities in Downey, California and Seal Beach, California. These buildings contain more than 3,200,000 sq. ft. and include multi-level buildings for the assembly of rocket systems, research and engineering laboratories, computer facilities, corporate management offices and other manufacturing and assembly areas for highly technical aerospace equipment. The Plant Services Department is responsible for the overall maintenance, construction and repair of buildings occupied by the Space Division. These functions include the repair of manufacturing equipment, the construction and repair of buildings and fixtures, as well as custodial maintenance.

4. The interstate activities of the Space Division are carried on by an integrated system of management, design, engineering, production, distribution and other functions, each of which plays an indispensable role in the ultimate development of products by Rockwell. Some of these functions are service functions which support and/or direct manufacturing operations. The management of the Space Division, including the management of purchasing, quality control, personnel, production and distribution, performs a vital service without which no products could be manufactured. This is also true of design and engineering services, data processing services and plant services. Without these services integrated into a cohesive manufacturing system, the Space Division could not operate efficiently nor compete in the market for its products. The Plant Services Department falls under the direct supervision of the production management of the Space Division and works together with the other functional divisions of the Space Division toward the ultimate production of aerospace vehicles and equipment.

4. The Plant Services Department maintains the electrical and water systems, the heat and air conditioning equipment, the steam generation facilities, the gas and oxygen systems and other such systems within the offices, laboratories and manufacturing areas within the Space Division facilities. The Department also maintains the vehicular equipment operated by the Space Division as well as the manufacturing equipment.

5. In the performance of custodial maintenance, the Plant Services Department also performs services which are

directly involved in the assembly and testing of manufactured parts and systems. For example; the Space Division operates eight "clean rooms" in which highly sensitive aerospace equipment is assembled and tested. At least one of these rooms presently requires a cleanliness level of less than 160,000 dust particles per cubic foot of air. The maintenance of these rooms is a highly refined activity involving specializing training, techniques and equipment. Maintenance employees cleaning these rooms must wear head coverings, smocks and shoe coverings and are given an air shower before entering the clean room. The employees must utilize specialized vacuum cleaners, chamois mops and chemically treated dusting gloves in cleaning these rooms. The manufacturing and testing operations within clean rooms are such that if the particulate level within the room is exceeded the room must be shut down for cleaning.

6. Another area within the Space Division facilities which requires an extremely high level of cleanliness is the Western Corporation Computer Center. The breakdown of the data processing equipment in this facility severely burdens and interrupts the operations of Rockwell International. In fact, it is personnel in the corporate offices in Pittsburgh, Pennsylvania who first notice and complain when this computer malfunctions. Other data processing equipment is operated by the Space Division in the Flight Simulation Laboratory. This Laboratory features three analogue computers which electronically simulate inflight conditions. This room and other data processing centers within the Space Division are an integral part of the design and production of space equipment and proper maintenance of these rooms is critical to the efficient operations of the computers.

7. The removal of trash and waste products from offices, laboratories and manufacturing areas is also an important part of the effective use of these areas.

8. The management of the Plant Services Department of the Space Division considers subcontracting for custodial and other maintenance services to be distinctly advantageous. We would subcontract most or all of these activities were it not for the existence of a binding labor agreement with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Article XXV of this agreement, a copy of which is attached as a part of this affidavit, pro-

hibits Rockwell from subcontracting for janitorial maintenance work for longer than two months in duration. Only when the work to be performed is beyond the experience or equipment capabilities of Rockwell or when there are insufficient Rockwell personnel to perform the work may it be subcontracted. The principal reasons for this preference for subcontracted janitorial services are as follows: Self-maintenance places an excessive drain on management resources, in contrast to the ability of a subcontractor to provide virtually all of the management and supervision function. Rockwell does not have access to a labor pool as large or as motivated as the janitorial contractor and Rockwell's custodial work force has an unusually high turnover. One reason for this is that during periods of layoffs any senior employee may "bump" a junior custodial employee. In addition, in hiring new custodial employees it often requires six to ten weeks for Rockwell to process an applicant before he is able to begin his employment. The most compelling reason for this preference, however, is the significant cost advantage incident to subcontracting for custodial services. Under the UAW contract, Rockwell has a significantly higher wage rate for custodial employees and carries a fringe benefit cost of approximately 50 per cent of the average hourly rate. As a result of the factors listed above, the Space Division would subcontract for most or all of its janitorial services if it were permitted to do so.

9. Despite the limitations on subcontracting, during the period January, 1969 through June 30, 1970, Benton performed a significant amount of contracted janitorial services for the Space Division. These services included "high dusting" and the cleaning of work benches in the world largest clean room located in Rockwell's Building 290. Benton performed high dusting in manufacturing areas within Rockwell's Seal Beach, California facility in which S-II rockets, a part of the Saturn Launch System, were assembled. Benton also performed high dusting and other maintenance functions in other clean rooms and manufacturing areas. High dusting is one service for which Rockwell is able to contract on an annual basis as it has never been performed by UAW members. High dusting requires large inputs of staging equipment and personnel which Rockwell does not have available. Moreover, a distinct expertise is required to perform this operation which Rockwell personnel do not possess. High dusting in the clean room of

Building 290 is vital to the assembly and testing operations performed therein. The services performed by Benton in maintaining these clean rooms and manufacturing facilities are indistinguishable from the operations of the Plant Services Department in terms of their importance to the design, development and manufacturing functions which take place in these facilities.

10. Most of the plants operated by Space Division and a significant amount of the manufacturing equipment are owned by the National Aeronautics Space Administration (NASA). Rockwell operates these plants under contract to NASA. NASA audits the operations of the Plant Services Department and the quality of the maintenance of these plants and equipment. As a result, the proper maintenance of these facilities is important to the continuing contractual relationship between NASA and Rockwell International.

/s/ Charles W. Moxley
CHARLES W. MOXLEY

(Jurat Omitted in Printing)

MASTER AGREEMENT

between

NORTH AMERICAN ROCKWELL CORPORATION
AEROSPACE AND ELECTRONICS GROUPS

and the

INTERNATIONAL UNION,
UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA
(UAW)

Effective December 5, 1971

resented by the Union for the term of this Agreement in accordance with the provisions of such revised program.

ARTICLE XXV

SUBCONTRACTING

The Company agrees that it will not subcontract maintenance work operations to be performed on Company premises when such subcontract covers continuing work operations to be performed for longer than two (2) months and when the work operations involved have normally been performed by employees in the bargaining unit, unless a sufficient number of employees are not available to perform such work operations within the time required.

ARTICLE XXVI

SELECTED SKILLS PROGRAM

1. A Selected Skills Program, together with a Selected Joint Apprentice Committee Agreement providing, as set forth herein, an apprenticeship training program and amendments to Article XVI, Wages and Article XVII, Hours and Special Pay Provisions in their application to such Program and Agreement, have been agreed to by the parties.

2. The following classifications are among those Selected Skills classifications being considered for apprenticeship. For purposes of Selected Skills treatment, only certain lower level classifications (if any) related to each of the Selected Skills classifications will be identified for the crediting of time toward becoming a journeyman as noted below.

BEST COPY AVAILABLE

Affidavit of John Blain

John Blain, being first duly sworn, deposes and says:

1. Continuously since March 1964, I have held my present position of Procurement Supervisor of Central Purchasing for North American Rockwell Corporation and Rockwell International, 2201 Seal Beach Boulevard, Seal Beach, California. In February of 1973 the name North American Rockwell Corporation was changed to Rockwell International. As part of my duties, I have been responsible for the procurement of janitorial maintenance services. I have general knowledge of the business of Rockwell International and particularly of the activities of the Space Division during the aforesaid period. I recognize the relationship between janitorial services and the overall operations of Rockwell International.

2. During the period May 1969 through June 30, 1970, the activities of the Space Division of North American Rockwell Corporation were interstate and international in character. During the period, the Space Division was engaged in the design, engineering, development, production and interstate distribution of various products for manned and unmanned spacecraft including the Apollo command and service modules, the S-II stage of the Saturn Launch System and various other components of spacecraft, launch vehicles and rocket engines in the Apollo/Saturn and other programs. In support of these operations, in fiscal year 1970 the Space Division committed procurements of $75,743,222 for raw materials, supplies, equipment and component parts, substantial quantities of which were purchased outside the State of California.

3. Several of the buildings in which the Benton Companies performed janitorial services for North American Rockwell are buildings owned by National Aeronautics and Space Administration (NASA). Most of the manufacturing equipment located in these plants and the products manufactured therein are the property of NASA and the United States Government.

4. Rockwell International maintains a Plant Services Department which is responsible for maintenance operations in the buildings operated by the Space Division. The janitorial services supplied by the Benton Companies prior to June 30, 1970 were services in direct support of Plant

Services Department personnel and were often services that were beyond the current equipment and personnel capabilities of the Plant Services Department. For example, in 1970 Benton Maintenance Company provided "high dusting" services in areas in which S-II rockets were manufactured and assembled before transfer to Cape Kennedy, Florida. These services included the general cleaning and dusting of ceilings, sky lights, ceiling equipment, and fixtures. "high dusting" requires a considerable amount of scaffolding or "staging" equipment and large numbers of employees. We chose to utilize Benton's specialized equipment and experience to accomplish this task on the basis of Benton's low bid in response to Rockwell's Invitations To Bid.

5. I am generally aware that a high degree of cleanliness is required in the manufacture of space vehicles and aerospace systems. For example, the Space Division operates the world's largest "clean room" located in Building No. 290 in the NASA complex of buildings in Downey, California. In this room, the command and service modules for the Apollo spacecraft are assembled and tested. This room and other "clean rooms" operated by Rockwell contain test stands, work stands and assembly operations which require a very high maintenance quality level. Prior to June 30, 1970, Benton periodically was awarded contracts for the cleaning of such work stands, "high dusting" and other maintenance operations within the "clean room" of Building No. 290 and the other "clean rooms" operated by Rockwell. Benton also performed maintenance operations in areas in which S-II rockets were assembled and in areas which included research and engineering testing laboratories. I periodically receive calls from Plant Services personnel stating that it will be necessary to cease operations in these "clean rooms" and in other manufacturing areas if the areas are not properly cleaned. Based upon assertions by responsible Plant Services personnel, it is my understanding that maintenance operations within such areas act in direct support of the production of goods which are engineered and manufactured to extremely close tolerances.

6. The services provided by the Benton employees were indistinguishable from the services performed by personnel working in Rockwell's plant services department in terms of

their importance to the operations of Rockwell International.

7. I have found Benton to be a strong competitor in competitive bidding in response to Rockwell's invitations for bids, and in the provision of high quality services. Benton had a particularly high quality of field supervision which is a valued feature of a janitorial maintenance contractor's services. To the best of my knowledge ABMI has subsequently used this field supervision in performing maintenance services under contracts awarded subsequent to its acquisition of Benton. To my knowledge ABMI was awarded no such contracts prior to June 30, 1970.

/s/ John Blain
JOHN BLAIN

(Jurat Omitted in Printing)

AFFIDAVIT OF ALAN D. LEVY

ALAN D. LEVY, being first duly sworn, deposes and says:

1. Since January 1972, I have held the position of Vice President for Tishman Realty & Construction Co., Inc.; New York, New York and, as such, I have the responsibility for the management of Tishman buildings on the west coast. Previous to that I was Director of Property Management for the same west coast area starting in July 1969. Immediately prior to that, I was Regional Manager of the company's east coast and midwest area properties. In all these positions I have had responsibility for procuring essential janitorial maintenance services for Tishman and I have had to be cognizant of the Tishman policies and requirements for janitorial maintenance contracting services and the needs of its tenants for such services.

2. For approximately three years prior to June 30, 1970, Benton Maintenance Company provided services to the Tishman Plaza buildings at 3440, 3450, 3460 and 3470 Wilshire Blvd., Los Angeles, California, pursuant to a "Janitorial Maintenance Agreement." This complex of buildings contains over 750,000 sq. ft. and more than 200 offices occupied by various individuals and corporations. Under the contract Benton was responsible for the general maintenance of both the lease areas and the common areas of the buildings. These services included general cleaning and the removal of trash from the offices of the tenants of the buildings, maintenance of common passageways and rest rooms and for a portion of the time in which Benton serviced the Tishman buildings it provided 24-hour security service for the buildings. In addition, Benton supplied operating engineers who maintained and regulated the air conditioning, heating and electrical systems in the buildings. Under the contract, Benton also supplied all of the materials and equipment used in performing the cleaning functions listed above including tools, cleaning chemicals, waxes, floor machines, rest room materials and uniforms for security and janitorial personnel.

3. The services provided by Benton constituted an essential and vital part of the operation of the buildings and the activities carried on within them. Without heat and air conditioning, lighting and electricity, few if any activities could have been carried on within the premises nor would

there have been tenants to occupy the buildings if the air conditioning, heating and electrical systems were not properly maintained and operated. The general cleaning, maintenance and the removal of trash from the offices of tenants of the buildings are services which tenants require to be performed at very high levels of thoroughness and efficiency. The provision of watchmen to provide after-hours security and monitor traffic in the building during working hours is also a service that is vital to the activities of the tenants and without which Tishman would have considerable difficulty attracting good tenants for its buildings. The proper maintenance of common areas within the buildings is essential not only to provide free and open access to the business operations of the tenants but is a highly important financial consideration for Tishman. The skilled maintenance of these common areas and the insurance and indemnification required by the contract insulates Tishman from a substantial risk of liability. A principal reason that Tishman contracts for the janitorial maintenance of its buildings is that the contractor supplies a unified service which performs not only the cleaning and operation of building equipment and systems but also provides the management and supervision of these services. In so doing, Benton worked in close cooperation with both Tishman and the tenants of the Tishman buildings. In fact, we place such significant importance on the responsibility for the proper maintenance and operations of the buildings that the activities of a contractor such as Benton can be said to be a vital part of the operations of the buildings.

4. Tishman is engaged in the business of constructing commercial buildings, leasing and managing them throughout the United States. Tishman presently operates approximately 33 buildings in the following states: California, Illinois, New York, Ohio and Pennsylvania. In fiscal 1969, Tishman reported total property income of approximately $37.5 million. The company maintained its headquarters offices in New York City and from this location supervises and monitors the operations of Tishman's operations throughout the United States. Corporate officers in New York periodically execute janitorial contracts and receive financial reports on the operations of Tishman buildings on a regular basis. These communications include reports submitted by Benton concerning wages and benefits paid to the Benton work force in the Tishman Plaza buildings. The

Tishman management in New York is consulted before a major janitorial maintenance contract, such as the contract with Benton, is entered into.

5. It has always been the company policy and practice since I have been with the company to contract for janitorial services in most of our buildings. In so doing, we avail ourselves of these specialized services rather than try to simulate the offerings of a contractor with an in-house janitorial operation. Cleaning contractors specialized service and expertise are directly and vitally related to the efficiency of Tishman's overall operations. This is because, unlike us, contractors have a knowledge of the labor market in the area in question, they have an understanding of maintenance skills, they have the ability to screen workers for security risks, they know how to design efficient work routines, they know what maintenance materials and equipment are correct to use and how to use them, they have the capability to handle emergency maintenance situations requiring extra manpower and they can purchase supplies in bulk discount quantities and store adequate quantities. Benton was such a competitor in the Los Angeles area, and excellently performed the desired services.

6. There are two basic functional ingredients to the operation of a modern office buildings: management and maintenance. These two functions are so interdependent that a great deal of functional cooperation is required. Benton was a major contractor of Tishman and in the Los Angeles area the services performed by Benton constituted a significant portion of the activities required to operate the Tishman buildings. Because of firms like Benton, Tishman was able to carry out its policy of contracting to obtain the benefits of the janitorial maintenance specialist's knowledge and capabilities. By utilizing janitorial contractors such as Benton, Tishman operates its nationwide building leasing operation on a cost effective basis.

7. The tenants of the Tishman Plaza buildings included among others the following interstate business: Pacific Telephone and Telegraph Company; Avis, Inc.; Texaco Inc.; Carte Blanche Corporation and J. J. Newberry Co. The services supplied by a contractor such as Benton were integral parts of the business activities of these tenants in that those working in their offices could not have conveniently performed their business functions without the

building providing a clean, air conditioned, heated, ventilated, lighted, secure and generally habitable working environment.

8. Benton was a very high quality janitorial maintenance contractor and an active competitor in the Los Angeles area. The management of the Benton organization was unusually dedicated to its service business and we found them very responsive when we had a problem. They took an active personal interest in our buildings and were unusually attentive to our needs for janitorial maintenance service. Benton's absorption into ABMI reduced by one the competitors which Tishman can look to for the satisfaction of our janitorial maintenance needs. To service a group of buildings as large as the Tishman Plaza, a janitorial maintenance contractor must be of a substantial size in order to be able to finance the initial costs of equipment and the paying of wages and other obligations while awaiting payment of the contract fee from us. Only a limited number of contractors in the Los Angeles area meet this standard and the elimination of Benton has reduced by one the number of qualified competitors competent to service the Tishman Plaza buildings.

/s/ Alan D. Levy
ALAN D. LEVY

(Jurat Omitted in Printing)

AFFIDAVIT OF DONALD E. DEL DOSSO

DONALD E. DEL DOSSO, having first been duly sworn, deposes and says:

1. Continuously since March 1970, I have been Buildings Supervisor for General Telephone Company of California, 2020 Santa Monica Boulevard, Santa Monica, California, with responsibility for the geographic area from Marina Del Rey on the south to Santa Maria on the north and from the San Fernando Valley in the west to Lancaster in the east. I have been employed by General Telephone Company of California or its predecessors since January 1, 1946, and have had duties as a Lineman, Central Office Installer, Engineer, Plant Construction Foreman, Supply and Building Maintenance Foreman, as well as my present position. My experience in these positions included various operations dealing with switching and crossconnecting equipment. In my present position and in other positions I have held with General Telephone since 1962, I have been responsible for the procuring of contracted janitorial maintenance services. As part of my present duties, I need to be and am aware of the necessary role which janitorial maintenance services play in the operation of General Telephone's business of providing communications services. This role is required in rooms which house our switching and crossconnecting equipment because a high degree of cleanliness is necessary in such rooms.

2. I have procured and supervised the janitorial maintenance contracting services of both Benton Maintenance Company and J. E. Benton Management Corp. I did not distinguish between such services supplied by the one as opposed to the other, because they were both the same company as far as I was concerned. They both had the same office and the same telephone number and I dealt with the same person for both companies, namely Ivar S. Gustafson. Therefore, I will hereafter refer to these companies as "Benton."

3. Prior to June 30, 1970, Benton supplied janitorial maintenance services to about 20% of the General Telephone buildings in my area. We were very pleased with the high quality of cleaning work performed by Benton as evidenced by the fact that Benton cleaned the General Telephone headquarters building continuously since it opened in about 1956.

The quality of janitorial maintenance was of importance to General Telephone because Benton maintained central offices where telecommunications switching and crossconnecting equipment is located. The janitorial maintenance services supplied by Benton were an essential service to General Telephone because cleanliness is required in these switchrooms which have millions of electrical contacts. General Telephone depended upon the expertise of Benton as a janitorial maintenance contractor to remove from these rooms the dust and dirt which could cause misconnections and wrong numbers and could even prevent calls from being completed at all. The maintenance and cleaning of the actual telephone equipment in these rooms was performed by General Telephone personnel. We also relied upon personnel of Benton working in conjunction with our own personnel to devise schedules and procedures which would accomplish this result in such a way as to permit us to continue our communications functions. Our switchrooms handle a substantial volume of communications to and from all parts of the United States and the world via other telephone companies' equipment, and Benton, in providing an essential service to General Telephone's operations, played a part in the total operations of our company.

/s/ Donald E. Del Dosso
DONALD E. DEL DOSSO

(Jurat Omitted in Printing)

AFFIDAVIT OF GEORGE G. GUEST

GEORGE G. GUEST, being first duly sworn, deposes and says:

1. I am Staff Supervisor—Buildings for The Pacific Telephone and Telegraph Company, 740 South Olive Street, Los Angeles, California, with responsibility for janitorial maintenance for The Pacific Telephone facilities in the area from Santa Maria to Long Beach. I was promoted to this position in March 1972. Prior to that I was Plant Staff Assistant starting in October of 1970 and served as Building Maintenance Foreman starting in August 1967, both for the central Los Angeles County area. My duties in these positions have included the procuring of contracted janitorial maintenance services. I am generally familiar with the communications operations of Pacific Telephone and with the Company's requirements for janitorial maintenance services.

2. From September 1969 through June 30, 1970, Benton Maintenance Company pursuant to contract supplied janitorial maintenance services in my area, which is known as the "Wilshire District". These services included general cleaning and dusting, maintenance of restrooms, removal of dirt and trash and the supplying of the materials and equipment used in performing these services. In the Wilshire District, Benton serviced ten Pacific Telephone Company central office facilities, four office buildings, a plant work center and eight other facilities. The central offices house the telephone switching and cross-connection equipment which handle calls to and from other parts of California, the United States and the world.

Pacific keeps the central office switching equipment clean to help insure trouble-free operation. Benton's work included cleaning the rooms in which the switching equipment was located but did not include cleaning the switching equipment itself. Cleaning of the equipment was done by Pacific Telephone Company employees.

We provided Benton with appropriate general directions as to what had to be done but also relied upon their ability as an experienced janitorial maintenance contractor to keep the premises clean.

Among the matters we considered of importance in selecting Benton (and other such contractors) were (a) being an

established business, (b) being apparently in stable financial condition, (c) having a good reputation and (d) having experience in the trade.

/s/ George G. Guest
GEORGE G. GUEST

(Jurat Omitted in Printing)

AFFIDAVIT OF JOHN STOVER

JOHN STOVER, being first duly sworn, deposes and says:

1. Continuously since June, 1968, I have held the position of Building Manager for Mobil Oil Corporation, 612 South Flower Street, Los Angeles, California. My duties have included the procuring of contracted janitorial maintenance services for the Mobil Oil building at the above address. I have personal knowledge of the activities of the Mobil Oil Corporation, the activities of most of the tenants of the Mobil Oil building, and the part which contracted janitorial maintenance services play in these activities.

2. Mobil Oil Corporation is an international corporation. For example, Mobil operates crude oil exploration and production facilities in many states and facilities for refining crude oil into various petroleum products. It distributes and markets these petroleum products on a worldwide basis. The Mobil Oil building in Los Angeles houses the corporation's Marketing Department which has responsibility for Mobil's marketing in the seven western states, a Manufacturing Accounting Section which supports the operation of refineries in the States of California and Washington, a Western Area Production Department whose activities in 1969 and 1970 included substantial exploration in Alaska, and Mobil's Los Angeles Accounting and Computer Center. The Marketing Department located in the Mobil building regularly conducts business with over 3,500 service stations variously located in the seven western states. Its employees travel extensively throughout Mobil's Western Region. Mobil's Credit Card Center for the seven western states also utilizes computer equipment located in the Mobil building. In 1969 and 1970, the electronic data processing equipment operated by these functional groups initiated the billing for, monitored receipt of, and disbursed millions of dollars annually.

3. The mechanical operation of electronic data processing equipment is dependent upon the janitorial maintenance and the environmental support facilities of the rooms in which the equipment is located. In 1969 and 1970, Benton employees serviced the filters of the air conditioning equipment for these rooms, improper servicing of which could have caused the computer equipment to malfunction, thereby seriously interrupting the operations of Mobil's Western Region.

4. Several other corporations maintain offices in the Mobil Oil building. Included among these tenants in 1970 were the Kaiser Steel Corporation, Hendy International, Pacific Far East Line, Inc., Ducommun Metals Corporation, Republic Steel and the Du Pont Corporation, all of whom it is believed at various times engaged in interstate commerce. A more complete list of the tenants of the Mobil Oil building in 1970 is attached as a part of this affidavit.

5. Since its construction in 1949, until June 30, 1970, the Mobil building was operated and the janitorial maintenance function exclusively was performed by J. E. Benton Management Corporation. Prior to August, 1963 the services supplied by Benton consisted of building operations and janitorial maintenance. In providing building operating services, Benton performed functions including purchasing and making payment for building supplies, and procuring the repair and maintenance of the heating and air conditioning equipment, electrical and plumbing system. Benton generally conducted the business of operating the building. Between August, 1963 and June 30, 1969, Benton performed only janitorial services in the building. This work was performed under the name J. E. Benton Management Corporation despite the fact that no management services were performed. During this period, Mobil also contracted with Benton Maintenance Company for window washing services. For both services I dealt with the same Benton personnel and regarded these two companies as one.

6. The general cleaning and maintenance of the building is a direct and vital part of Mobil's operations and the activities of its tenants. Proper maintenance of offices and common areas within the building is insisted upon by the tenants and by Mobil personnel. Attractive and well maintained offices and clean and unobstructed public areas are of vital importance to the businesses of our tenants. A poorly maintained building or office is not conducive to an image of business efficiency and contributes to the loss of customers and tenants.

7. In 1969 and 1970, Benton also supplied the services of operating engineers who monitored and performed preventative maintenance and repair on the building's heating and air conditioning equipment and other fixtures and systems. The work of these engineers was a critical part of the activities carried on in the building. Without heat, light

and plumbing, few, if any, operations could have been carried on in the building.

8. In 1972, Mobil sent requests for bids for the janitorial work previously performed by Benton to five companies who we considered to be qualified bidders. These companies met our requirements for financial stability, had strong reputations for maintaining large buildings and met Mobil's strict indemnity bonding requirements. These five companies were Bekins, Kinney National, Prudential, Los Angeles Building Maintenance and American Building Maintenance Industries. Prior to the acquisition of Benton by ABMI, Benton would also have received a request for bids and their bid would have been carefully considered because of the excellent service that Benton had previously provided. We have found Benton to be an extremely strong competitor in the provision of quality janitorial maintenance services. Mobil relies upon competition to assure that alternate sources of quality janitorial maintenance will be available and the acquisition of Benton by ABMI eliminated Benton as an alternate source in this industry.

/s/ John Stover
JOHN STOVER

(Jurat Omitted in Printing)

Affidavit of L. B. Higbee

L. B. Higbee, being first duly sworn, deposes and says:

1. In October 1969, I was appointed Assistant Building Manager for Union Oil Company at its international headquarters building, 461 S. Boylston, Los Angeles, California. I was promoted to my present position of Building Manager of said building in October 1970. I am generally familiar with the business of Union Oil Company and of the business activities carried on in its international headquarters buildings. As part of my duties, it has been necessary for me to thoroughly understand the important relationship between janitorial maintenance services supplied to said building and the efficient operation of Union Oil Company. As Building Manager, I have been responsible for the procurement of such services.

2. From October 1969 through June 30, 1970, the Union Oil Company, through its officials and employees at the international headquarters building, carried on and supervised substantial business which was interstate and international in character. In 1969, Union Oil Company reported net sales for said business of $1.58 billion. During this time, our company relied on J. E. Benton Management Corp. maintenance services which played an essential role in facilitating the business activities at its headquarters building.

3. J. E. Benton Management Corp. was supplying janitorial maintenance and related services at our headquarters building when I became Assistant Building Manager in October 1969 and continued to supply said services to Union Oil Company through June 30, 1970. The services which J. E. Benton Management Corp. supplied included maintenance of floors, restrooms, removal and disposal of trash, window washing and lighting fixture maintenance. They were also responsible for the maintenance and operation of the air conditioning, heating and electrical systems of the building. As part of its service, the Benton organization selected and obtained cleaning materials and equipment, as well as certain supplies to be used in the building.

4. Janitorial maintenance contractors like J. E. Benton Management Corp. have teams of experienced personnel with expertise and capacity for the supervision, follow-up and back-up of this maintenance work which Union Oil

Company does not have. During the period October 1969 through June 30, 1970, Union Oil Company depended upon this special expertise and capability of J. E. Benton Management Corp. and considered that firm to be an integral part of the business carried on at our international headquarters. Without such services, our company would be severely hampered in its capacity to carry out its extensive national and international business.

/s/ L. B. Higbee
L. B. Higbee

(Jurat Omitted in Printing)

Affidavit of Edward H. Patotzka

Edward H. Patotzka, being first duly sworn, deposes and says:

1. From September 1958 to September 1970, I held the position of Supervisor of Office Services for Texaco Inc. at the West Coast operations building, 3350 Wilshire Boulevard, Los Angeles, California. My duties included the procuring of contracted janitorial maintenance services for this building and as part of this job it was necessary for me to be aware of the requirements of the various Texaco departments for such services.

2. Prior to June 30, 1970, J. E. Benton Management Corp. provided contracted janitorial maintenance services to the aforesaid Texaco building, including general cleaning and dusting, removal of dirt and trash, window washing, restroom maintenance and supplying all the necessary maintenance materials, equipment and supplies (including cleaning fluids, brooms, scrubbing equipment and restroom paper supplies). This service also included the stationing of a Benton employee in the lobby of the building to admit persons who were proper to be in the building at night and to screen out all others. I dealt with Robert E. Benton, James J. Breen and William McWethy of the Benton organization, among others. I was advised by Mr. Breen that from time to time Mr. Breen secured workmen from the Benton janitorial maintenance job at the nearby Tishman buildings and allocated them to the Texaco building when absentees needed replacement. Other services provided by J. E. Benton Management Corp. included the operation and maintenance of the air conditioning and heating systems in the building and the supervision and performance of electrical and mechanical maintenance. In addition, J. E. Benton Management Corp. secured and paid for the electricity, water and natural gas used in the building.

3. Prior to June 30, 1970, Texaco contracted with the J. E. Benton Management Corp. to obtain their expertise which Texaco did not possess. This expertise included their expert knowledge of what cleaning and maintenance materials to use and how to apply them. In my opinion the services performed by Benton pursuant to the contract with Texaco were highly satisfactory and, for that reason, Texaco did not ever solicit competitive bids for the supplying

of janitorial maintenance services to the aforesaid building after Benton began supplying said service, although other contractors did seek our business. Benton's services included the areas of the aforesaid building containing computers and data processing equipment which handled billing to and from Texaco customers throughout the western United States as well as the financial accounting for Texaco's operations in said area. Dirt and dust between the electrical contacts of the computers or on the retina of the scanning devises in the building could have hampered their operation. Texaco relied upon Benton's expertise to supply this and the other janitorial maintenance services to the aforesaid building.

/s/ Edward H. Patotzka
Edward H. Patotzka

(Jurat Omitted in Printing)

Affidavit of Maynard Heider

Maynard Heider, being first duly sworn, deposes and says:

1. Continuously from 1948 to July 1972, I was General Office Manager for the Carnation Company at its world headquarters building, 5045 Wilshire Boulevard, Los Angeles, California. I was responsible, among other things, for seeing that janitorial maintenance services were supplied for said building.

2. Prior to June 30, 1970, the Carnation Company world headquarters building housed the company's Evaporated Milk Division, Instant Milk Division, Pet Foods Division, Bottled Milk and Ice Cream Division, Contadina Division (engaged in vegetable and fruit canning) and Can Manufacturing Division. The Albers Milling Company (an animal foods producer) and McGraw Color Graph Co., were Carnation subsidiaries that were located in the building also. In addition, Carnation International, which operated plants in Scotland, France, Holland, West Germany, Spain, South Africa, Peru, Mexico and Australia, and Carnation Co. Ltd., which operated about five milk and potato processing plants in Canada, were headquartered in the Carnation building. The various divisions of Carnation operated from this world headquarters numerous plants located in the states of New York, Missouri, California, Tennessee, Kentucky, Illinois, North Carolina, West Virginia, Washington, Colorado, Texas, Pennsylvania, Virginia, Michigan, Wisconsin, Iowa, Illinois, Idaho, Arizona, Oregon, Oklahoma, Hawaii and Utah. Carnation reported sales from its total operations of $964 million for the year 1969.

3. J. E. Benton Management Corp. provided comprehensive building management services at the Carnation world headquarters from the opening of the building in 1948 through June 30, 1970. The duties which Benton had included general cleaning of the 100,000 square feet of floor space in the nine-story building, maintaining the restrooms, providing a night watchman to patrol every part of the building once an hour, cleaning and relamping lights, window washing, removal of trash, maintaining the air conditioning, heating plant and plumbing and providing the materials and supplies used in performing these services. Carnation could have tried to use its own employees to clean

the building, but we decided in 1948 that we wanted a janitorial maintenance contractor to perform this work because we did not have any experience at it. Unlike contractors, we did not know the size and kind of work force necessary to do particular jobs. Neither did Carnation have a janitorial maintenance labor pool from which to draw employees as a contractor did. Also, as a result of his broad experience in servicing many customers in different types of locations, janitorial maintenance contractors know how to design efficient and effective work routines, they know what materials and what equipment can do the best job and they have a professional knowledge of how to supervise and motivate a janitorial work crew. In providing Carnation with janitorial maintenance services, the Benton management, supervisory staff and work crew was performing the same task that would have been performed had Carnation had its own employees doing this work, but Carnation was obtaining the benefit of Benton's experience, capabilities and specialized skills.

4. Carnation's world headquarters building houses the top management of this national and international company. The management and corporate leadership centered in this facility is the primary motivating force for the activities of the company. This management is the final authority for the production and distribution of the company's interstate goods. Without light, heat and power for this building the management activities could not take place. The management and maintenance of a safe and habitable working area is desirable for a world headquarters building.

5. Prior to June 30, 1970, the various divisions and subsidiaries (referred to in paragraph 2) which conduct their operations from the Carnation world headquarters building utilized the computer complex located in the building. This computer complex was used to store, retrieve and analyze information about Carnation's interstate production and marketing and was vital to our company's operations. We always had a critical problem of how to maintain the cleanliness of the area in which these computers were located. It was very important to keep the area free of dust and dirt which could impair the operations of this sensitive electronic equipment. However, the janitorial maintenance of this area was complicated by the fact that the computers operated 24 hours a day and janitorial work crews might get in the way of those operating this equipment or acci-

dentally push a button or hit the controls on the computers. This necessitated a close working relationship between the supervisor of the Carnation Data Processing Department and the Benton night foreman. They worked together to make sure that the computer area was frequently mopped to remove the fine paper dust created by computer print-out paper going through the machines at high speed. Also, the high powered electric current in this area used to operate the computers presented a high danger of fire and the supervisor of Data Processing and the night foreman worked together to ensure that there was as little trash and used print-out paper in the room as possible. Thus, Benton's cleaning activities were important in the proper operations of Carnation's data processing equipment. If the janitorial maintenance services which Benton provided in this computer area had not been performed, Carnation's data processing would have likely been disrupted by the dust or even by fire.

6. We were very pleased with the high quality and dependability of the janitorial maintenance contracting services which Benton provided to the Carnation world headquarters. Benton's reliability and stability was demonstrated in part by the fact that it was a three-generation family business. Other janitorial maintenance contractors called on me periodically to obtain our business, but I discouraged them because we were completely satisfied with Benton and saw no reason for changing. American Building Maintenance, Kinney National, Pierose and White Glove were the four big contractors that actively sought Carnation's business.

/s/ Maynard Heider
MAYNARD HEIDER

(Jurat Omitted in Printing)

AFFIDAVIT OF EDMUND SAKOWICZ

EDMUND SAKOWICZ, being first duly sworn, deposes and says:

1. Continuously since May 1969, I have held my present position of Office Services Manager for Teledyne, Inc., 1901 Avenue of the Stars, Suite 1800, Los Angeles, California. As part of my duties, I have been responsible for the procurement of janitorial maintenance services. I am generally knowledgeable of the business of Teledyne, Inc. and of the activities carried on in its Century City Office during the aforesaid period. I recognize the relationship between janitorial services and the overall operations of Teledyne, Inc.

2. From May 1969 through June 30, 1970, the business of Teledyne, Inc. carried on at and supervised from its Century City headquarters was interstate and international in character. During said period, Teledyne, Inc. reported revenues for the fiscal year ended October 31, 1969 of $1.29 billion. During the period, Teledyne, Inc. was engaged in several states and in foreign countries in the production of electronic and aviation control systems; production and fabrication of specialized metals; production of machines used in metal working applications, manufacturing unmanned aircraft, gas turbine engines and a variety of aviation products and components and industrial products; and in insurance and financial businesses.

3. Janitorial maintenance contracting services play an essential part in the interstate and international business activities conducted by Teledyne, Inc. at its Century City headquarters.

4. Benton Maintenance Company was supplying contracted janitorial maintenance services for the headquarters of Teledyne, Inc. in Century City when I came to work there in May 1969. Benton Maintenance Company continued to supply said services to Teledyne, Inc. through June 30, 1970. During this period, Benton Maintenance Company also selected and ordered on behalf of Teledyne, Inc. maintenance equipment and restroom paper supplies from National Sanitary Supply Co. and floor waxes from Ball Industries.

5. The janitorial maintenance contracting services provided by Benton Maintenance Company for the headquar-

ters office of Teledyne, Inc. consisted of a comprehensive variety of services, including maintenance of floors, care of restrooms, and removal of disposal of trash. Teledyne, Inc. recognizes that any janitorial maintenance contracting firm supplying this comprehensive type of service to our company must have an extensive degree of expertise in terms of floor maintenance, selection of proper cleaning materials (waxes, detergents, etc.) and equipment, cleaning procedures, trash removal and overall janitorial operations. Without a specialized firm supplying such services, our office operations would be seriously curtailed. Benton Maintenance Company, in supplying these services, is a part of our interstate and international business carried on at our Century City Headquarters office, just as is any component or unit in the Teledyne, Inc. operations.

/s/ Edmund Sakowicz
EDMUND SAKOWICZ

(Jurat Omitted in Printing)

II. SUPPLIERS

AFFIDAVIT OF DAVID T. HANNAH

DAVID T. HANNAH, being first duly sworn, deposes and says:

1. I am presently employed by the Westinghouse Electric Corporation, Elevator Division, as District Marketing Manager and maintain offices at 600 St. Paul Avenue, Los Angeles, California. As part of my duties, I have had supervisory responsibility for the sale of elevator equipment and maintenance to J. E. Benton Management Company. I have reviewed the records of Westinghouse and have personal knowledge of the accuracy of the facts set out below.

2. For several years prior to June 30, 1970, Benton was billed and remitted payment for the maintenance and repair of the Westinghouse elevator equipment located in the Texaco Building, 3350 Wilshire Boulevard, Los Angeles, California. During calendar year 1969, Benton paid Westinghouse $13,752.65 for parts, materials and repair of this elevator equipment. Parts and materials purchased by Benton were supplied directly by Westinghouse and came primarily from Westinghouse plants in Jersey City and Dover, New Jersey. Substantially all billing documents from Westinghouse to J. E. Benton Management Corporation were shipped by the Westinghouse Electric Corporation, Customer Accounting, Elevator Construction Division, 150 Pacific Avenue, Jersey City, New Jersey. All remittances by Benton were made to the Westinghouse Electric Corporation, Elevator Division, P. O. Box 146, Pittsburgh, Pennsylvania.

3. Westinghouse provides elevator construction and repair on a nationwide basis. These activities are centered in Millburn, New Jersey and supported by manufacturing facilities in various locations including Jersey City and Dover, New Jersey. The parts and materials manufactured in Jersey City and Dover, New Jersey are intended for sale to customers such as Benton. As such, these parts and materials move continuously from manufacturing sites in New Jersey to customers within California.

4. Elevator repair and maintenance is an essential part of the operation of modern multi-story buildings. Even

the most modern automated elevator equipment requires regular inspection and protective maintenance. Various pieces of equipment including motors, generators, controller parts, guide rails and cables must regularly be inspected and maintained. Failure to perform this work can put elevators out of service and seriously disrupt the business activities carried on in commercial buildings such as the Texaco Building.

/s/ David T. Hannah
DAVID T. HANNAH

(Jurat Omitted in Printing)

AFFIDAVIT OF JAMES B. KRIEGER

JAMES B. KRIEGER, being first duly sworn, deposes and says:

1. Since July of 1965, I have been employed by The Metropolitan Water District of Southern California. My present position is that of Principal Administrative Analyst with the Water Distribution Branch. I have held this position for the last two years. Through my employment with The Metropolitan Water District of Southern California, I have become quite familiar with and knowledgeable of its overall operation.

2. The Metropolitan Water District of Southern California is organized and exists under the Metropolitan Water District Act (California Stats. 1969, Chapter 209, as amended). Section 130 of that Act provides:

> "Sec. 130 [*General Powers to Provide Water Service*]
> A district may:
> (a) Acquire water and water rights within or without the state.
> (b) Develop, store and transport water.
> (c) Provide, sell and deliver water at wholesale for municipal and domestic uses and purposes.
> (d) Fix the rates for water.
> (e) Acquire, construct, operate and maintain any and all works, facilities, improvements and property necessary or convenient to the exercise of the powers granted by this section."

The Metropolitan Water District exercises the powers conferred by said Section 130 and, in addition, pursuant to other provisions of said Act, sells surplus water for agricultural and groundwater basin replenishment purposes.

3. During the period from January of 1969 until June of 1970, the Metropolitan Water District operated as a wholesale water supplier delivering water to portions of six Southern California counties. These counties are Riverside, San Bernardino, San Diego, Orange, Los Angeles, and Ventura. The Metropolitan Water District during this time imported the water through the Colorado River Aqueduct System to the Southern California Coastal Plain. The water was then distributed throughout the distribution system of The Metropolitan Water District of Southern California to

26 member agencies. These member agencies included 13 cities, 12 municipal water districts and 1 county water authority (San Diego County Water Authority). The map attached shows location of these member agencies.

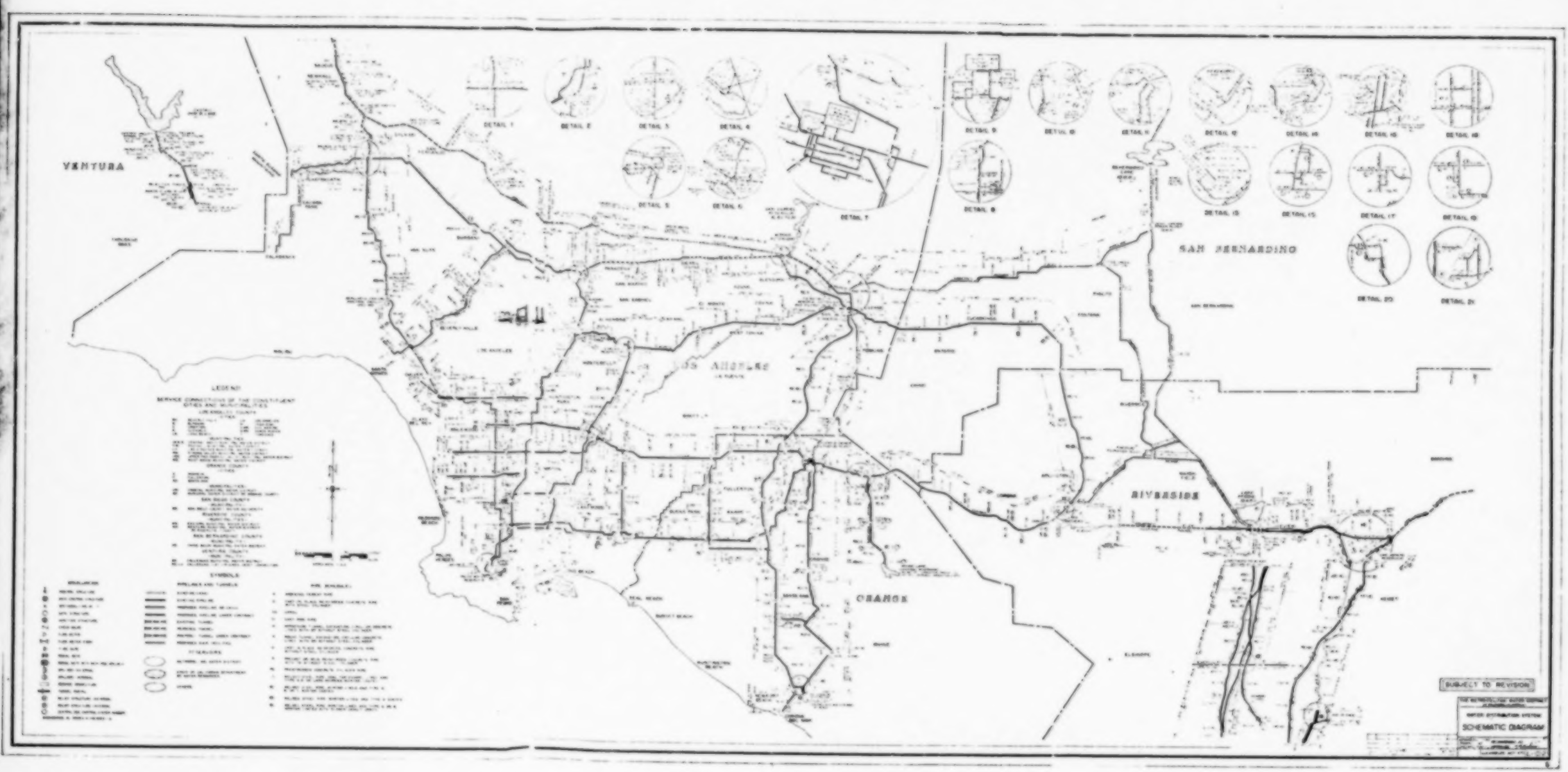
4. During this time, from January of 1969 to June of 1970, the only significant source of water for the Metropolitan Water District was the Colorado River. The Colorado River system extends into seven Colorado River basin states which are California, Arizona, Nevada, Colorado, Utah, Wyoming, and New Mexico. Water is pumped out of Lake Havasu and goes through five pumping stations in California, traveling generally westwardly from Lake Havasu. Water then flows by gravity through the remainder of the Metropolitan Water District distribution system.

5. The power to pump the water from Lake Havasu into the Colorado River Aqueduct for conveyance to the Metropolitan Water District's distribution system came from Hoover Dam, Parker Dam, Glen Canyon which is located in Page, Arizona, and from the Southern California Edison Company. Approximately sixty percent of the electricity used by these pumping stations to facilitate the flow of water from Lake Havasu through the Colorado River Aqueduct System to its distribution on the Southern California Plain came from out-of-state sources.

6. To my knowledge, most of the water supplied to the 26 member agencies by the Metropolitan Water District during the period between January 1969 and June 1970 originated from out-of-state sources, after having been temporarily stored in Lake Havasu, Arizona.

/s/ James B. Krieger
JAMES B. KRIEGER

(Jurat Omitted in Printing)



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Affidavit of Duane L. Georgeson

Duane L. Georgeson, being first duly sworn, deposes and says:

1. I have been the Engineer in Charge of the Aqueduct Division of the Department of Water and Power, city of Los Angeles, since about the middle of 1972. I have worked for the Department of Water and Power for 14 years and through my employment have become familiar with and knowledgeable concerning the source of water supplied to the various sections of the Los Angeles area.

2. As Engineer in Charge of the Aqueduct Division, I manage two aqueduct systems which supply 80 percent of the water to Los Angeles. These aqueduct systems are the first and second Los Angeles Owens River aqueducts. There are 320 people in the Aqueduct Division under my supervision and the Aqueduct Division is also responsible for the management of 300,000 acres of land in the Owens Valley in California. From January 1969 through June 1970, I was a Northern District Engineer in Charge of the first aqueduct in the Owens Valley.

3. The three sources of water for the Los Angeles Basin from at least January 1969 through June 1970, were the following:

(a) The Owens River Aqueduct;
(b) Colorado River water which supplies the Metropolitan Water District; and
(c) local ground water.

Water supplied via the Owens River aqueduct does not have any out-of-state sources. Some of the ground water could be collected from Colorado River water through natural means or artificial spreading. Colorado River water has its source from the Colorado River which travels through seven states: Colorado, Wyoming, Utah, Arizona, New Mexico, Nevada, and California. The attached map illustrates the flow of this river. The percentages of water from these three sources are the following: 60 percent from the Owens River aqueduct, 15 percent from the local ground water and 25 percent from the Colorado River water.

4. The Metropolitan Water District pays 25 cents an acre foot for water storage in Lake Mead. Lake Mead is between Nevada and Arizona. This payment is passed on to the

residents of the city of Los Angeles in the form of water bills and tax rates. The water from the Colorado River after being stored in Lake Mead continues down the Colorado River from Lake Mead to Lake Havasu in Arizona and then travels to the Los Angeles Basin via the Colorado River aqueduct. The water travels through the aqueduct by means of a pumping plant on the California side of Lake Havasu, which pump is operated by the Metropolitan Water District of Southern California.

5. Although 25 percent of the total water supplied to the city of Los Angeles up to June 26, 1970 was attributed to Colorado River water, vast portions of the city of Los Angeles, including Hollywood, the Civic Center, mid-Wilshire (including the 3000 block of Wilshire Boulevard in the Ambassador Hotel District), and West Los Angeles, derived much of their water supply from the Colorado River. Colorado River water was also the source for much of the water supplied during this time period for the area encompassing Los Angeles International Airport.

6. In my view as a layman, I would think that the operations of the Metropolitan Water District would be in the flow of interstate commerce to the extent that it transmits Colorado River water. It also pays a storage fee, described above, for water in Lake Mead. The Metropolitan Water District of Southern California utilizes electricity to pump water from Lake Havasu to the Los Angeles Basin. This electricity comes from Hoover Dam which is located between Arizona and Nevada, the Parker Dam which is in Arizona and the Southern California Edison Company. Also, the Metropolitan Water District has contracts with certain units at Hoover Dam and Parker Dam. These contracts are for the supply of electrical energy which is used in the pumping plants in California. Pumping plants are utilized to transmit the flow of water from Lake Havasu to the Los Angeles Basin via the Colorado River aqueduct. This Colorado River water which originate out-of-state and travels to the Los Angeles Basin is an interstate commodity and is involved in the flow of commerce by the basic nature of its operations in supplying the water needs not only to the Los Angeles Basin but also Orange and San Diego Counties.

/s/ Duane L. Georgeson
DUANE L. GEORGESON

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COLORADO RIVER BASIN

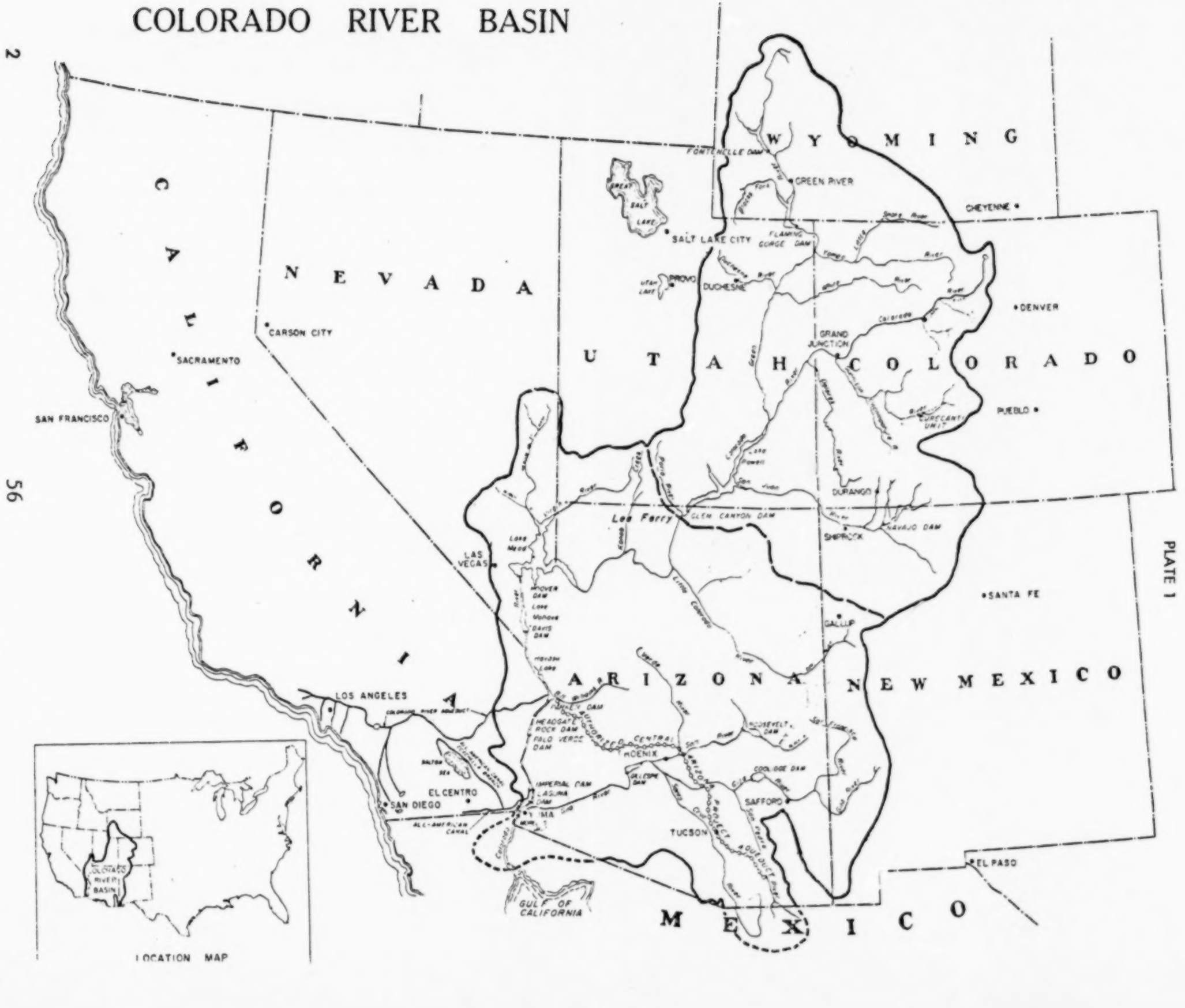

PLATE 1

Affidavit of Thomas A. Nelson

Thomas A. Nelson, being first duly sworn, deposes and says:

1. My present position is that of Senior Electrical Engineer, Power Operating and Maintenance Division, Department of Water and Power, city of Los Angeles. I have held this position since June 1972. Before that I was the Chief Inspection Engineer for three years, and Assistant Chief Inspection Engineer until 1969. I have been with the Department of Water and Power, city of Los Angeles, since July 1942. I have personal knowledge of the facts set out below.

2. During the time period of January 1969 until June 1970, there were two important out-of-state sources from which electrical energy supplied by the Department of Water and Power, city of Los Angeles, was derived. The first source is electrical energy which is generated from the Hoover Dam in Arizona and Nevada. Here there are operated by the Department of Water and Power a number of turbine generators. These generators are also operated by the Department of Water and Power for other agencies and municipalities besides the city of Los Angeles. These are the Colorado River Board of Nevada, the city of Pasadena, the city of Glendale, the city of Burbank, the Imperial Valley Irrigation District, the Metropolitan Water District of Southern California, the United States Bureau of Reclamation, and an Arizona state agency.

3. The second source of electrical energy supplied to the Department of Water and Power from out-of-state was that energy which was purchased through the Bonneville Power Administration in the Columbia River Basin located in the States of Oregon and Washington. The electrical energy from this source came over the AC intertieline to its initial distribution in the city of Los Angeles. The Department of Water and Power had several contracts with other agencies for the transmission of electrical power over this AC intertieline from the Bonneville Power Administration. These agencies are the Southern California Edison Company, Pacific Gas and Electric, and the Bonneville Power Administration.

4. Electrical energy not generated through these out-of-state sources is generated in steam plants and boilers which are located within the State of California. The natural gas used as a source of power for these boilers and generators is purchased from the Southern California Gas Company

which in turn gets a great deal of their gas from Texas. The fuel oil used in the operation of these steam plants and boilers come from Indonesia, the Southern United States, North Africa, and Alaska.

5. Prior to distribution, the electricity comes to receiving stations by transmission lines, then to distributing stations, and finally transmitted by ground or overhead distribution lines to commercial facilities, office buildings, and residences. At the receiving station point in the system of distribution, the electrical energy generated in Nevada, Arizona and California, and also the energy purchased from the Bonneville Power Administration, is mixed and comingled to such an extent that it is impossible to determine thereafter the original source of the electrical energy which is transmitted to distributing stations, and subsequently utilized by consumers in Los Angeles. Indeed, it is impossible to determine whether individual consumers at any point in time are receiving a high or low percentage of energy generated outside the State of California.

6. During the time period of January 1969 until June 1970, the total number of kilowatt hours attributed to turbine generators in Arizona and Nevada (Hoover Dam), was 1,593,764,000. During the same period, 2,944,541,000 kilowatt hours of electrical energy were purchased from the Bonneville Power Administration. This represents a total amount of 4,538,305,000 kilowatt hours of electrical energy which had its point of origin outside the State of California.

7. During the time period of January 1969 until June 1970, the dollar amount of that portion of the electrical energy supplied to the city of Los Angeles by the Department of Water and Power transmitted from out-of-state, as described above, is the following—the dollar figure for the electrical energy generated in Arizona and Nevada, during this period, was $3,421,851.81 and for that energy purchased from the Bonneville Power Administration, during the same period, $11,790,930.33, or a grand total of $15,-212,782.14.

8. A significant portion of the electrical power supplied by the Department of Water and Power, city of Los Angeles, originated outside the State of California and was transmitted through interstate channels.

/s/ Thomas A. Nelson
Thomas A. Nelson

(Jurat Omitted in Printing)

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POWER SYSTEM DIAGRAM

DEPARTMENT OF WATER & POWER

CITY OF LOS ANGELES

POWER OPERATING & MAINTENANCE DIVISION
OPERATING ENGINEERING SECTION

L-CHIEF
JANUARY 1, 1973

Affidavit of Ross Callahan

Ross Callahan, being first duly sworn, deposes and says:

1. I am presently employed as Finance Manager of Courtesy Chevrolet Company and maintain offices at 833 South Western Avenue, Los Angeles, California. I served as Lease Manager between 1970 and April 1973, and had personal responsibility for the lease and sale of certain automobiles and trucks to J. E. Benton Management Corporation and Benton Maintenance Company. I have reviewed the records of Courtesy Chevrolet and have personal knowledge of the facts set out below.

2. Prior to the acquisition by ABMI, the Benton companies leased automobiles and trucks from Courtesy Chevrolet Leasing. During the calendar year 1969, Benton leased 34 automobiles and trucks consisting of 3 Cadillacs, 4 Pontiacs, 6 Chevrolet Vans and 21 Chevrolet Sedans and Station Wagons. Despite the fact that some of these automobiles were leased under the name J. E. Benton Management Corporation and others were leased by Benton Maintenance Company, I dealt with the same Benton personnel in all of my negotiations concerning the lease of these automobiles. I regarded these two companies as one.

3. In 1969 Benton was billed a total of $38,346.17 under the lease agreements with Courtesy Chevrolet Leasing. These billings included amounts to cover the capitalized cost of the vehicles, license expenses, state sales tax and interest. The portion of the monthly lease payment which is attributable to the capitalized cost of the automobiles in 1969 amount to $21,901.70. This amount goes directly to the financing company, at that time Courtesy Chevrolet Leasing, and is the amount of the lease cost that is attributable to the cost of these interstate vehicles.

4. In 1971 I was advised by ABMI personnel, who were formerly Benton personnel, that they no longer desired to lease the automobiles which Benton had leased, but rather to purchase them for the remainder of the capitalized cost of the vehicles. This sale was executed and the automobiles were transferred to ABMI personnel, who were formerly Benton personnel, in fee, despite the fact that not all of the lease agreements had been terminated at that time. The total purchase price had already been fully paid on five of the automobiles by leasing them beyond the period of the

lease and ABMI personnel, who were formerly Benton personnel, were given a credit for these automobiles. The total price for the sale of these automobiles to ABMI amounted to $29,666.66.

5. The automobiles and trucks leased and sold by Courtesy Chevrolet to Benton were vehicles that had moved in interstate commerce. All of the automobiles and trucks were assembled from parts manufactured outside the State of California. Moreover, of the vehicles leased by Benton in 1969, 14 were assembled outside the State of California and shipped into California for lease to Benton. The 3 Cadillacs were assembled in Detroit, Michigan; some of the Pontiacs were assembled in Arlington, Texas and others in Pontiac, Michigan; the Chevrolet Vans were assembled in Pontiac, Michigan and some of the Chevrolet Sedans and Station Wagons were assembled in Willow Run, Michigan.

6. For several years, Benton had been a significant fleet lessor from Courtesy. Courtesy considered Benton's leasing demands in ordering automobiles from General Motors Corporation. In ordering automobiles from General Motors, Courtesy anticipated that they would be leased and/or sold to customers such as Benton. As such, these vehicles were moving continuously in interstate commerce up to the point at which they were leased and used by Benton.

7. Benton was a valued customer of Courtesy and our business relations with them were mutually advantageous. We solicited Benton's lease of these automobiles and were they not acquired by ABMI we would have continued our solicitation of their business. In fact, we expected that they would be in the market for new automobiles to be leased or purchased in approximately 1971. Benton has been eliminated as a valued customer of Courtesy Chevrolet.

/s/ Ross Callahan
ROSS CALLAHAN

(Jurat Omitted in Printing)

AFFIDAVIT OF J. FRANK TURBEVILLE

J. FRANK TURBEVILLE, being first duly sworn, deposes and says:

1. I am employed by the Southern California Gas Company as Manager of Gas Control and maintain offices at 3494 East Pico Boulevard, Los Angeles, California. Continuously since 1966, I have had supervisory control over the transmission facilities and operations of the Southern California Gas Company. I have personal knowledge of the geographic origin of the natural gas purchased by the Southern California Gas Company, the transmission of that natural gas through pipelines to the distribution system of the Southern California Gas Company and the Company's method of distribution to consumers.

2. During the period January, 1969 through June, 1970, over 80 per cent of the natural gas distributed by the Southern California Gas Company originated outside the State of California. The percentage of interstate natural gas reaching consumers in Los Angeles and Orange Counties, however, may have been significantly higher. During this period, natural gas purchased by the Southern California Gas Company had three principal sources:

(a) Purchases from the El Paso Natural Gas Company and the Trans Western Pipeline Company were purchases of natural gas all of which originated outside the State of California. That supplied by the El Paso Natural Gas Company originated in the Texas Panhandle area and the Four Corners area, (the contiguous portions of Utah, Arizona, New Mexico and Colorado). This gas was transported to measuring stations in Arizona in the Vicinity of Blythe and Needles, California. There it was measured and sold to the Southern California Gas Company. The sources of the gas purchased from the Trans Western Pipeline Company during this period were located in the Texas Panhandle, Western Texas and Southeast New Mexico. This gas also was supplied by pipeline to the Arizona side of the Colorado River near Needles, California, and there transmitted and sold to the Southern California Gas Company.

(b) Natural gas was purchased from Phillips Oil Company, Union Oil Company of California, Mobil Oil Corporation and other producers which was derived from

production in the Santa Barbara Channel under Federal offshore leases, located in international waters, outside the State of California. Purchases from offshore sources amounted to approximately one per cent of the total purchases of natural gas in 1970.

(c) Southern California Gas Company also purchases natural gas from oil producers located within the State of California. There are three principal geographic centers for this production; the San Joaquin Valley, the Coastal Region from Ventura to Paso Robles and the Los Angeles Basin. In 1969 and 1970, purchases from these domestic suppliers amounted to less than 15 per cent of the total purchases of natural gas by the Southern California Gas Company.

3. The transmission and distribution systems of the Southern California Gas Company have not changed significantly between 1969 and the present. The facts stated below accurately describe the present system and the system as it existed in 1969.

4. The gas received by the Southern California Gas Company from each of its suppliers has been treated, purified and odorized to bring it up to certain specifications as "pipeline quality gas." Pipeline quality gas requires no further purification or treatment before delivery to consumers. The only exceptions consist of an occasional need to remove dust or oils from the gas, introduced in the transmission process, and the infrequent necessity to replenish the odorization.

5. The Southern California Gas Company utilizes a transmission system consisting of various pipelines feeding into distribution systems. The principal pipeline sources of natural gas for the Los Angeles Basin are large high pressure pipelines, one of which transmits the gas purchased at Blythe, California, to East Los Angeles, La Puente and Los Angeles; another transports gas from Needles, California, through Victorville, Fontana, Yorba Linda into the Los Angeles Basin. These pipelines and others serve customers in Los Angeles and Orange Counties via various feeder lines and the Los Angeles Loop System. A portion of a brochure describing the sources of natural gas and the transmission facilities of the Southern California Gas Company is attached as a part of this affidavit.

6. The amount of domestic natural gas that reaches Los

Angeles and Orange Counties consumers varies with the location and season. This is due to the fact that domestic supplies are used first to satisfy the needs of local consumers before being transported into Los Angeles and Orange Counties. Therefore, in the San Joaquin Valley, Ventura and Paso Robles area consumers are supplied with gas produced in their areas before the surplus is transmitted to the Los Angeles Basin. During the winter months when local demands in these areas increase, it is often true that no domestic gas remains to be transported for use in the Los Angeles Basin. During these periods all of the gas that is used in the Los Angeles Basin is derived from interstate sources.

In the Los Angeles Basin, except for the extremely small group of customers receiving supply direct from domestic sources, the small amount of domestic natural gas that is introduced into the distribution system is so mixed and comingled with gas from interstate sources that it is totally diluted and becomes indistinguishable from the interstate natural gas. Moreover, there are distribution systems within the Los Angeles and Orange Counties area which receive substantially all of their natural gas from interstate sources.

8. After the gas is transmitted to the Los Angeles Basin via high pressure pipelines, it is introduced into lower pressure transmission systems located within Los Angeles and Orange Counties and broken again into lower pressure lines before final transmission to the consumer. For example; consumers along Wilshire Boulevard in the Ambassador Hotel district receive their purchases of natural gas through the Northwest Distribution Division which operates a distribution line running along Wilshire Boulevard. This line receives its supplies from Transmission Line No. 761 which runs north and south through the Hollywood area into the Slauson Crenshaw area and connects through other lines to the Loop System. Because of the characteristics of the distribution system to the Wilshire Boulevard distribution line, it would be very unusual for any domestic natural gas to be introduced into this distribution line.

9. Natural gas is a primary source of energy in today's commercial and industrial society. Not only is it a primary heating source for homes, office buildings and manufacturing plants, it is also used as fuel for blast furnaces and steam generation facilities. For example; the Southern

California Gas Company sells natural gas to the Los Angeles Department of Water and Power for use in its steam generation facilities.

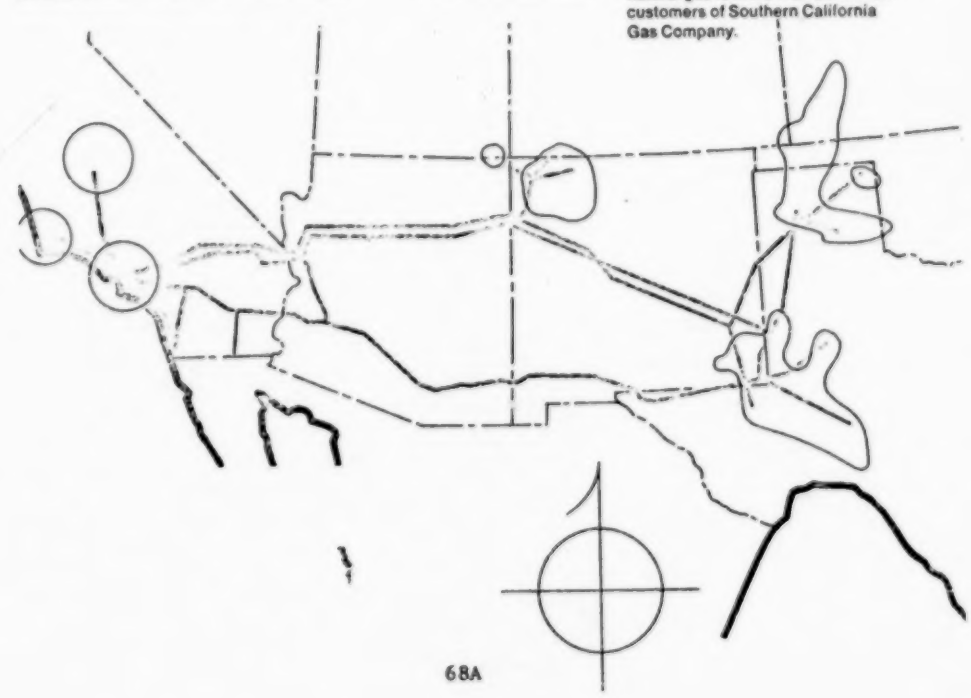
10. Natural gas supplied to the Los Angeles Basin is fundamentally an interstate commodity.

/s/ J. Frank Turbeville
J. FRANK TURBEVILLE

(Jurat Omitted in Printing)

NATURAL GAS, THE ENVIRONMENTAL FUEL, PLAYS VITAL ROLE IN SOUTHLAND'S ENERGY PICTURE

As a fuel, natural gas is efficient, clean-burning and attractively priced. It's also in heavy demand—and short supply—in many parts of the country. The current national energy crisis affects all fuels and places the greatest pressure on the most desirable. The situation in southern California, however, is comparatively bright. There is enough gas available to meet the needs of "firm" customers—homes and businesses—now and in the foreseeable future. These "firm" customers constitute 99.9 percent of Southern California Gas Company's total customer public. The map (below) indicates the present sources of gas used in the Southland. More than 80 percent comes from outside California. A computerized central dispatch facility in Los Angeles (left) controls the flow and delivery of natural gas to more than 3.2 million customers of Southern California Gas Company.



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Affidavit of Irving A. Singer

Irving A. Singer, being first duly sworn, deposes and says:

1. I have been President of Ball Industries, 277 Coral Circle, El Segundo, California (herein referred to as "Ball") since 1965. Ball supplies janitorial maintenance equipment and materials to customers throughout the Los Angeles area. I have access to the records of Ball and am knowledgeable of the dealings of my company with major and significant customers. I am also knowledgeable as to the inventory stocking requirements of my company and the location of the manufacturers and producers of the items Ball has sold.

2. Prior to June 30, 1970, Benton Maintenance Company and J. E. Benton Management Corp. (herein both referred to as "Benton") were one of the top 3 accounts of my company. The records of my company show that, in 1969, Benton purchased and received janitorial maintenance equipment and materials from Ball in the amount of approximately ninety-three thousand five hundred dollars ($93,500), excluding sales tax. The aforesaid janitorial maintenance equipment and materials purchased by Benton included polishes, brooms, mops and dusters, buckets, vacuum cleaners and floor machines, portions of which came from out-of-state.

3. Prior to June 30, 1970, Ball enjoyed a continuous and regular business relationship with Benton on an open account basis. Since Benton was a major and significant customer of Ball, its purchases figured prominently in my company's total sales volume which sales volume was taken into consideration when anticipating the inventory stocking requirements of Ball for janitorial maintenance equipment and materials.

4. When my company, as a distributor for janitorial maintenance equipment and materials, purchased items for resale to Benton and other customers, it was our expectation that such items would move through our warehouse in a continuous flow to its ultimate destination—i.e. to Benton and our other customers. The turnover rate of Ball's stock of these items was at least four times a year, or once every 90 days or less.

5. Benton purchased through my company most of the

aforesaid equipment and materials for delivery by Ball from my company's warehouse directly to the Benton job sites located throughout the Los Angeles area.

6. At least forty (40) percent of the approximately ninety-three thousand five hundred dollars ($93,500) which Ball received for the aforesaid equipment and materials was for items which were shipped and transported directly to Ball across state lines from producers and manufacturers outside the State of California.

IRVING A. SINGER

(Jurat Omitted in Printing)

AFFIDAVIT OF ROBERT B. GARBER

ROBERT B. GARBER, being first duly sworn, deposes and says:

1. I am presently employed as President of National Sanitary Supply Company (hereinafter National) and maintain offices at 14455 South Broadway, Gardena, California 90061. As part of my duties, I have had supervisory responsibility for the sale of certain products to J. E. Benton Management Corporation and Benton Maintenance Company and have personal knowledge of facts set out below.

2. Prior to acquisition by ABMI, the Benton companies purchased various products from National including paper towels, hand towels, toilet tissue, seat covers, sanitary napkins and certain floor machines and vacuum cleaners. I personally conducted a significant amount of the business negotiations with representatives of the Benton companies and had established a favorable business relationship with these gentlemen. Whether my negotiation concerned purchases by J. E. Benton Management Corporation or by Benton Maintenance Company, I contacted the same individuals at Benton and regarded the two companies as one.

3. National sold significant amounts of #025 paper towels, #045 hand towels and #121 toilet tissue to Benton which were purchased by National from the Crown-Zellerbach Co. These products were processed in various locations in the States of Oregon, Washington and California. Some of the products supplied by Crown-Zellerbach Co. were shipped directly to National from outside the State of California. In addition, National sold to Benton sanitary napkins carrying the Modess, Tampax and Kotex brands. The Modess product is manufactured and shipped directly to National by the Rochester Germacide Company in Rochester, New York; the Tampax products are shipped directly to National by the American Products Development Company of Chicago, Illinois and the Kotex napkins are supplied by Kimberly-Clark Company of Neenah, Wisconsin. In 1969, National also sold to Benton approximately 25 Holt Floor Machines which were manufactured and shipped to National from either Tampa, Florida or Malden, Massachusetts. During this period, National also sold to Benton National Super Service Model M Vacuum Cleaners,

manufactured and shipped from Toledo, Ohio; Advance automatic floor scrubbing machines manufactured and shipped from Minneapolis, Minnesota and Hoover Vacuum Cleaners which also originate outside the State of California. Less than five per cent of National's sales to Benton consisted of seat covers which are manufactured locally by the Clark Converting Company.

4. Benton was one of our largest single accounts for towels and tissue. National maintained an open account for Benton and purchased these products in anticipation of Benton's demand. National warehoused these products on a temporary basis to serve as a convenient step in the movement of these goods from the manufacturer to the consumer. In purchasing these goods, National intended that they would be sold and distributed to customers such as Benton. As such, these goods moved continuously in commerce until they were purchased by Benton and used in the buildings maintained by Benton. We delivered these products directly to Benton's job locations. As such, Benton was not required to stock, warehouse or deliver large quantities of these goods to their job locations. The paper towels, hand towels, toilet tissues, sanitary napkins and janitorial equipment sold by National to Benton in 1969 were goods which moved in interstate commerce and National served as a conduit in the movement of these goods from their manufacturer to Benton.

5. Benton was a large and reliable purchaser of towels and tissue from National. ABMI purchases these products from its Easterday subsidiary and since Benton's acquisition by ABMI, National has sold only a very limited quantity of goods for the accounts for which Benton previously purchased goods from National. Benton has been eliminated as a substantial purchaser of goods from National Sanitary Supply Company.

/s/ Robert B. Garber
ROBERT B. GARBER

(Jurat Omitted in Printing)

AFFIDAVIT OF MAX TOLBERT

MAX TOLBERT, being first duly sworn, deposes and says:

1) I am the Regional Manager of Crown Zellerbach, 3416 So. Garfield, City of Commerce, California, and have personal knowledge of the facts stated in this affidavit.

2) Crown Zellerbach sold #025 paper towels, #045 hand towels, and #121 and #139 toilet tissues to National Sanitary Supply Company, during the period of January, 1969, to June, 1970. These goods are manufactured in an integrated manufacturing system which involves reducing pulp into paper material which is subsequently converted into finished paper products. As part of this integrated system Crown Zellerbach operates production and manufacturing plants in Washington, Oregon and California. Crown Zellerbach operates pulp mills and conversion plants in Camas, Washington; Wauna, Oregon; and a manufacturing mill in Commerce, California.

3) Almost 100 percent of the #045 hand towels sold in the Los Angeles area to wholesalers like National Sanitary Supply Company are manufactured at the Crown Zellerbach plant in Camas, Washington. These hand towels are then shipped to the Crown Zellerbach warehouse in the City of Commerce in anticipation of demand from customers in this area, or directly from the Northern Mill to customer directly, such as National Sanitary Supply Company. The entire production and conversion of #045 paper towels, Rollmastr and Towlmastr, takes place wholly within the States of Washington and Oregon. For the convenience of our manufacturing system, the parent parent paper stock (pulp) for manufacturing 025's and 139 is shipped to California for conversion to paper towels and toilet tissues in the City of Commerce. The conversion activities which take place within California are a convenient step in this integrated manufacturing system.

4) The finished paper goods described above move from manufacturing to distributor, initially to wholesalers like National Sanitary Supply Company and then we believe some part thereof is distributed further to building owners and janitorial contracting firms, and as such move continuously in the flow of commerce from the point of origin until ultimately consumed.

MAX D. TOLBERT

(Jurat Omitted in Printing)

Affidavit of Richard Fields

Richard Fields, being first duly sworn, deposes and says:

1. I am presently employed as Section Manager, Order Processing Department, National Cash Register Company (hereinafter NCR) and maintain offices at 1940 Century Park East, Los Angeles, California. I have held similar supervisory positions in the Order Processing Department of NCR continuously since 1968. I have reviewed the records of NCR and have personal knowledge of the facts set out below.

2. Prior to its acquisition by ABMI, Benton leased an NCR 500 System. This is a business computer system which is ordinarily utilized for billing, monitoring the receipt of accounts receivable, disbursing accounts payable and performing general accounting and business management information processing and data retrieval. This system was leased to the J. E. Benton Management Company for use by J. E. Benton Management and Benton Maintenance Companies. I know of no distinction between these two companies other than their separate names and treated the two companies as one.

3. Benton's monthly rental for this equipment amounted to $1,110 to which a 5 percent California sales tax was added. For calendar year 1969, J. E. Benton Management Corporation was billed a total of $13,986.

4. NCR maintains principal offices in Dayton, Ohio and manufactures its 500 System exclusively in Dayton, Ohio. The equipment is shipped from the manufacturing site in Ohio to our offices in Los Angeles where it is temporarily stored before being transported to the customer such as Benton. The storage of this equipment serves only as a convenience in having equipment immediately available for lease or sale and NCR intends that the equipment will move as directly as possible to the lessor or purchaser. It is often necessary to order a piece of computer equipment directly from the factory in Dayton and it is possible that the NCR 500 System leased to Benton was shipped directly from Dayton without significant storage in the State of California. NCR also provides repair and maintenance of this equipment. Such repair and maintenance was provided exclusively by NCR personnel.

5. In addition, both Benton Maintenance Company and

J. E. Benton Management Corporation purchased forms for use in the 500 System from NCR during 1969. These forms are designed and printed in Ohio and shipped directly to California for use by NCR customers.

6. Benton was a valued customer of NCR and we believe we established a mutually beneficial business relationship. We solicited Benton's business and would have continued to seek renewal of our lease with Benton and/or the lease or sale of additional equipment. After its acquisition by ABMI, Benton's equipment lease was terminated. Our efforts at leasing equipment to ABMI have been unavailing as they have incorporated Benton's needs for information processing and data retrievable into their own larger computer system. All efforts at selling or leasing NCR equipment to ABMI have failed.

/s/ Richard Fields
Richard Fields

(Jurat Omitted in Printing)

Affidavit of Victor Cano

Victor Cano, being first duly sworn, deposes and says:

1. Continuously since 1971 I have held my present position as Vice President of Preferred Distributing Company, 2850 W. Pico Boulevard, Los Angeles, California. As part of my duties, I am aware of the sales of Preferred Distributing Company to Benton Maintenance Company and J. E. Benton Management Corporation. I have reviewed the records of Preferred Distributing Company and have personal knowledge of the accuracy of the facts set out below.

2. Prior to June 30, 1970, Preferred sold to Benton Maintenance Company and J. E. Benton Management Corporation incandescent, mercury and florescent lights and ballast. Ballast is an appliance providing electrical resistance utilized to stabilize the current supplied to mercury and florescent lamps. In calendar year 1969 the total sales of these products to the Benton companies amounted to approximately $12,954.

3. We regarded J. E. Benton Management Corporation and Benton Maintenance Company as one company. We performed some separate billing for the two companies, but dealt with the same personnel at Benton whether the purchases were for the maintenance or management company. In addition, when we delivered our products to the offices of the Benton companies they were delivered to one location. I was aware of no distinction in ownership or control between J. E. Benton Management Corporation and Benton Maintenance Company.

4. Preferred Distributing Company maintained an open account for Benton and regularly purchased lighting equipment in anticipation of Benton's demand. In fact, there were occasions on which we made special purchases in order to supply Benton its needs. Preferred warehoused the lighting equipment on a temporary basis as a convenient step in the flow of these goods from the manufacturers to the ultimate consumer. Often the lighting equipment sold to the Bentons was delivered directly to Benton's job locations. As such, Benton was not required to stock and warehouse large quantities of these goods.

4. The lamps and ballast were delivered to Benton at various locations in substantially the same form as they were received by Preferred. These products were delivered

in the same packaging material as received from the manufacturers.

5. All of the lamps sold to Benton were purchased from the General Electric Company and Sylvania, Inc. The ballast was purchased exclusively from Advance Transformer Company and Universal Transformer Company. Substantially all of these goods were manufactured outside the State of California.

6. Benton was a reliable customer of ours and upon the acquisition of Benton by ABMI, their purchases ceased. ABMI purchases its lamps and ballast from its own companies and does not require independent suppliers like Preferred in order to supply its customers. The loss of Benton as a customer has had a detrimental effect upon the business of Preferred Distributing Company.

/s/ Victor Cano
Victor Cano

(Jurat Omitted in Printing)

III. COMPETITORS

Affidavit of Carle E. Pierose

Carle E. Pierose, being first duly sworn, deposes and says:

1. I have been vice president of Bekins Building Maintenance Co., 1401 West Eighth Street, Los Angeles, California (herein referred to as "Bekins") and of its predecessor company, Pierose Building Maintenance Co., for about the last 15 years. Bekins was acquired in 1969 by the Bekins Company and since then has been a wholly-owned subsidiary. I have been associated with Bekins in the janitorial maintenance contracting business in the Los Angeles area continuously for about the last 25 years and have been generally familiar with the operations and customers of the major competitors in this area.

2. In the Los Angeles area, janitorial maintenance contracting services offered by Bekins and its other contractor competitors include night clean-up of buildings, window cleaning, dusting and sweeping, trash removal, furnishing of maintenance services during the day to maintain a building and the supplying of the janitorial equipment and supplies used in the performance of those services. The contractors in the Los Angeles area who supply this service have developed certain organizational and management skills which enable them to perform vital janitorial maintenance of buildings more efficiently and usually cheaper than their customers could. Working closely with the customer to satisfy his specified needs, the janitorial maintenance contractor knows better what materials and equipment do the best cleaning job, knows the capabilities of workmen and what work coverage can be demanded of them. Contractors also are more efficient because they have a staff of circulating supervisors who can check on the work being done. Also, the contractor has a large pool of on-call workmen from which to draw and thereby keep the maintenance forces fully staffed. The cleaning contractor's specialized service and expertise are directly and vitally related to the efficiency of the customer's overall operations, of which the cleaning contractor is an important part.

3. Prior to June 30, 1970, I was familiar with the janitorial maintenance contracting business operated by Jess

E. Benton and Robert E. Benton. Their customers for this service that I was aware of included: TRW, Tishman Plaza, Home Savings and Loan, North American Rockwell, Carnation Company, Union Oil Company, Pacific Telephone, General Telephone, Mobil Oil Company, Texaco and Jet Propulsion Laboratory. I regarded this janitorial business (herein referred to as "Benton") as one competitive entity. Benton had more major buildings accounts in the Los Angeles area than almost any other contractor. They had an advantage in obtaining the business of these accounts because the J. E. Benton Management Corp. also managed many of these buildings. Benton was among the top four janitorial maintenance contractors in the Los Angeles area, both in size and competitive effectiveness. American Building Maintenance was clearly the largest, followed by National Cleaning, Benton and Bekins, though not necessarily in that order.

4. Janitorial maintenance contractors like Benton and Bekins have serviced major business with interstate operations and activities (such as the Benton customers listed in paragraph 3). By contracting with a janitorial maintenance specialist such as Benton and Bekins, these national businesses have been able to take advantage of the cost savings and efficiencies (referred to in paragraph 2) which they would not be able to realize if they tried to do their cleaning in-house. In the 25 years I have been in this service industry, I have seen at least a four-fold growth in the ranks of those who wished to take advantage of the skills that we contractors in the Los Angeles area have. Janitorial maintenance contracting is a part of the growing service industry which is becoming a greater and greater part of national business operations. By turning over the maintenance of their buildings, interstate businesses need only specify their maintenance needs and supervise the end result, but do not have to bother with negotiations with janitorial labor unions, with searching for replacements for absentees, with providing the payroll services such as union health and welfare and pension payments, unemployment insurance, etc.

5. Many of the national business customers of Los Angeles area janitorial maintenance contractors like Benton and Bekins utilize sensitive electronic equipment such as computers in the operation of their interstate activites. We contractors must be very careful when doing maintenance in

areas where this equipment is kept. Oftentimes, it is located in special rooms which require a high level of cleaning. The danger, as I understand it, is that dust or dirt between the electrical contacts of this equipment would impair the operations of this equipment. Also, we contractors must work closely with these customers in making sure that the cleaning schedules, methods, materials and equipment we use facilitate the flow of their business activities. For example, the computers used by these customers are often operated around-the-clock and our maintenance personnel have to coordinate their work with the operations of the computer operators, and vice versa. Also, we have worked with these customers in choosing power cleaning equipment that did not generate electrical fields that would erase the electronic memory banks of this equipment. As another example, Bekins has cleaned the same two buildings at the Jet Propulsion Laboratory which Benton has serviced and which produced scientific devices to be used in the United States' exploration of Mars and man-to-the-moon programs. These buildings had to be specially cleaned in joint cooperation with those involved in the production activities there to make sure that no dust or dirt was present to get into this equipment and disrupt the success of this nation's space program.

6. Much of the equipment used by janitorial maintenance contractors in the Los Angeles area like Benton and Bekins is manufactured outside the State of California by such suppliers as Clarke Floor Machine Co., Muskegon, Michigan; Advance Floor Machine Co., Spring Park, Minnesota; and Kirby Company, Cleveland, Ohio. We could buy this equipment directly from these suppliers, but we utilize janitorial maintenance supply jobbers as a delivery arm of our business to secure this equipment and transport it to our job sites where it is used as part of the janitorial maintenance services which we offer. The direct purchase method would probably be cheaper, but the jobbers can better ensure the smooth continuous flow of these supplies from the manufacturer to our job site where they are intended to be used.

7. The acquisition of the Benton janitorial maintenance organization by American Building Maintenance was part of a trend of acquisitions of other such contractors in the Los Angeles area and of a larger national trend of such acquisitions. I am aware of Los Angeles area acquisitions since

1960 of Security Building Maintenance, Western Building Maintenance, and Coast Building Maintenance by National Cleaning Contractors; Monarch Building Maintenance by Prudential Building Maintenance; California Building Maintenance by Benton Maintenance Company; and White Glove Maintenance by ITT. Elsewhere during this period, I am familiar with a number of acquisitions of other janitorial maintenance contractors in the United States by ITT, of Hawaiian Building Maintenance by Allied Maintenance Company, of Pyramid Enterprises in Hawaii by Delmonte, and of Clean-up Inc. in Phoenix by Sanitas.

8. Prior to June 30, 1970, the janitorial maintenance contracting companies qualified to undertake major jobs in the Los Angeles area consisted primarily of American Building Maintenance, National Cleaning, Benton, Bekins, White Glove Building Maintenance and Monarch Building Maintenance. The acquisition of Benton by American Building Maintenance has adversely affected competition among these contractors for major building contracts by eliminating a strong contractor with many major buildings accounts and by placing control of many millions of dollars of annual contracting business in one competitor, namely American Building Maintenance. Bekins would have liked to acquire the Benton janitorial maintenance business itself because this would have approximately doubled our Los Angeles area business and given us a strong control over the market in this area. Bekins concluded, however, on advice of legal counsel, that such an acquisition by us would substantially and adversely affect competition and tend toward the creation of a monopoly in violation of the Federal antitrust laws. We, therefore, decided to forego an opportunity to acquire Benton.

/s/ Carle E. Pierose
CARLE E. PIEROSE

(Jurat Omitted in Printing)

Affidavit of Carl J. Goldman

Carl J. Goldman, being first duly sworn, deposes and says:

1. I am President of Los Angeles Building Maintenance Co. (LABM), 161 South Alvarado Street, Los Angeles, California, a janitorial maintenance contractor with which I have been associated for approximately twenty years. I am generally familiar with janitorial maintenance contracting in the Los Angeles area as a result of my business activities at LABM. I am aware of the important relationship which janitorial maintenance contractors have had to the national businesses of their customers in the Los Angeles area.

2. Prior to June 30, 1970, I was familiar with the janitorial maintenance contracting business engaged in by Benton Maintenance Company and J. E. Benton Management Corp. (referred to both as "Benton" hereafter). Benton had a great number of large buildings customers in the Los Angeles area for which they performed janitorial maintenance. I was informed that these customers included Union Oil Company and Tishman. We considered it a waste of time to try to solicit the janitorial maintenance business of the Benton customers such as these because they were satisfied with their service and loyal to Benton. Benton was among a handful of five or six competitors with whom we contended for the business of large buildings accounts in the Los Angeles area. Benton was the largest independent janitorial maintenance contractor in the Los Angeles area. The other major competitors, such as American Building Maintenance, National Cleaning and Bekins Building Maintenance, were reported to be part of larger national corporate structures. I should be happy about the absorption of Benton into American Building Maintenance's janitorial maintenance contracting business because this eliminated Benton as one of LABM's major competitors. American Building Maintenance was, I believe, already the largest competitor in the Los Angeles area and its acquisition of Benton has made it significantly larger, however.

3. Janitorial maintenance contractors in the Los Angeles area like LABM and Benton Maintenance Company and J. E. Benton Management Corp. were, prior to June 30, 1970, specialists in their field who provided their customers with a

specialized and vital maintenance service. These customers depended upon their janitorial maintenance contractors to provide their cleaning expertise as part of this specialized service. During said time, LABM and the Bentons possessed a high level of expertise in cleaning as demonstrated by the fact that both companies were qualified as bidders for the business of aerospace contractors where a janitorial maintenance firm must use special inspection and cleaning techniques. I am informed that the Bentons, like LABM, had numerous interstate business customers such as Union Oil Company and Tishman, who depended upon them to provide the janitorial maintenance expertise. In providing essential services to such customers, janitorial maintenance contractors work closely with them to develop the most efficient and workable procedures, which are necessary if these customers are to carry on their businesses.

/s/ Carl J. Goldman
Carl J. Goldman

(Jurat Omitted in Printing)

Affidavit of R. O. Robinson

R. O. Robinson, being first duly sworn, deposes and says:

1. I am Regional Manager for ITT Service Industries Corporation, 5285 Washington Boulevard, Los Angeles, California, a position I have held since September 1972. Prior to that, I was engaged in the janitorial maintenance contracting industry in Australia, Europe, South Africa and elsewhere in the United States over the course of 20 years. I have been with ITT since May 1971. ITT acquired the business that I presently manage in January 1971 when it was known as White Glove Maintenance. I am familiar with the conduct of janitorial maintenance contracting in the Los Angeles area.

2. Janitorial maintenance services supplied by contractors to their customers in the Los Angeles area include not only the general cleaning of the customers' premises, but also the supplying of the waxes, mops, floor cleaning machines and other materials and equipment which can come to the Los Angeles area from outside the State of California.

3. Janitorial maintenance contractors like ITT know the best way of doing their jobs, what to use and the right way of going about it. They furnish a service the customer has to have which is required by Occupational Safety and Health Act regulations and thus essential.

4. Many of the customers of janitorial maintenance contractors in the Los Angeles area are national and international businesses for which said contractors perform an essential function not any different in character from what a utility supplies in providing electricity, gas and water to these customers.

/s/ R. O. Robinson
R. O. Robinson

(Jurat Omitted in Printing)

IV. EXPERTS

Affidavit of Dr. Philip Neff

Philip Neff, being first duly sworn, deposes and says:

I am President of Social Sciences Research, Inc., 15433 Ventura Boulevard, Sherman Oaks, California 91403, a subsidiary of SERNCO, INC.

I have been a student, teacher, author, and commercial research economist for more than 30 years. I was awarded a BA degree in Economics at the University of California at Berkeley in 1939 and served as a teaching assistant during two graduate years. During my third year I was awarded the Newton Booth Fellowship in Economics. I received my PhD from that school in 1943. Subsequently, I taught economics at Texas Western College, the University of New Mexico, Pomona College, and UCLA. For limited periods of time I also taught at the University of Wisconsin and the University of Michigan. In 1961 I resigned from the UCLA faculty, as ancillary activities in commercial economic research were demanding more time than my academic schedule would permit. In 1954, I was one of the organizers of Planning Research Corporation and ultimately became Vice President for Economics of that corporation. My resignation from the UCLA faculty was occasioned by this involvement with Planning Research Corporation. From 1961 to 1969 I devoted full time to that corporation, retiring at the end of that time as a member of the Board of Directors and as Vice President for Economics.

Subsequently, I continued conducting research in application of economics to various business problems. I have authored or co-authored a number of professional articles and books dealing with price theory, business cycles, and the economics of site location. I have also authored or co-authored several hundred studies in the field of Confidential to Top Secret government classification.

During my years both as a professor and as a research economist, I have had many occasions to serve as an expert witness before both administrative agencies and the courts, these appearances numbering in the hundreds.

I have carefully examined documents on file in the ABMI case and have conducted and directed a very careful review of other relevant materials from public and trade sources

including those noted herein. The results of this study are set forth below.

I. Nature and Significance of The Service Sector of the Economy

A. *Definition*

The term "service industry" is generally accepted to mean economic activity which takes the salable form of a personal service (primarily or exclusively) rather than a material commodity. The industries which provide material commodities are not difficult to identify, consisting principally of agriculture, manufacturing, construction, mining, and the like. The service sector clearly includes establishments rendering janitorial and building maintenance services to other businesses.

The Standard Industrial Classification Manual describes "Services" under Division I as follows:

> . . . establishments primarily engaged in providing a wide variety of services for individuals, business, and government establishments, and other organizations. Hotels and lodging places; establishments providing personnel, business, repair, and amusement services; health, legal, engineering, and other professional services; educational institutions; membership organizations and other miscellaneous services are included. Establishments which provide specialized services closely allied to agriculture, mining, transportation, etc., are classified in their respective divisions.[1]

The manual provides a breakdown of "Services" by Standard Industrial Classification code number (SIC Code). The general industry group classification SIC 73, entitled "Business Services"

> . . . includes establishments primarily engaged in rendering services, not elsewhere classified, to business establishments on a fee or contract basis, such as advertising, mailing services; building maintenance services; protective services; equipment rental or leasing, (except finance

[1] Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, U.S. Government Printing Office, Washington, D.C., 1972.

> leasing); commercial research, development and testing; photo finishing; and personnel supply services.[2]

The SIC 73 group classification is comprised of seven three-digit subgroups. One of these is SIC 734, "Services to Dwellings and Other Buildings". Finally this subgroup is divided into three four-digit sub-categories including SIC 7349, "Cleaning and Maintenance Service to Dwellings and Other Buildings, not Elsewhere Classified, and SIC 7341, "Window Cleaning". The SIC 7349 category includes those establishments which are primarily engaged in cleaning and maintenance services such as janitorial service, floor waxing and office cleaning.

Examples of services listed under SIC 7349 include:

Building cleaning services, interior.
Chimney cleaning service.
Custodians of schools, on a contract basis.
Floor waxing service.
Hospital housekeeping (cleaning service) on a contract basis.

Janitorial services, on a contract basis.

Lighting maintenance service (bulb and fuse replacement and cleaning).
Maintenance, building (except repairs).
Office cleaning or charring service.
Service station cleaning and degreasing service.
Telephone booths, cleaning and maintenance.
Venetian blind cleaning, including work done on owners' premises.

It is apparent from these definitions that the Benton Corporations' activities clearly fall under the SIC 7349 classification.

B. *Growth of the Service Sector in Volume and Importance*

The United States has achieved the distinction of being the first nation in the history of the world to be classified as a "service economy". By 1968, 55 per cent of the labor force of the United States was employed in the service industries.[3]

[2] *Standard Industrial Classification Manual*, 1972.

[3] Ira U. Cobleigh, "Prudential Building Maintenance Corp." *Commercial & Financial Chronicle*, p. 1316, Oct. 3, 1968.

The shift in employment to a "service economy" from a "goods economy" where most of the labor force was employed in the production of food, clothing, houses, automobiles, and other tangible goods, has been most dramatic since the end of World War II.[4] Since 1946 virtually all of the net growth of employment in the United States has occurred in the service sector. In the State of California where total employment increased 92 per cent in the 23-year period from 1950 to 1970, the number of people employed in the service sector increased more than 148 per cent.[5] In the past decade the growth in the value of services has far out-performed that for the economy as a whole, having more than doubled over the ten-year span to about $300 billion. Furthermore, most segments of the service industry have been relatively immune to the ups and downs of the overall economy over the years.[6]

Prior to World War II most service sector individual businesses were small firms and a large proportion of them were self-employed entrepreneurs. The only service industries in which corporations were dominant were finance, real estate and insurance.[7] As the service sector has grown, service businesses have increasingly tended to adopt the corporate form.

The recent trend towards services occupying an increasingly greater percentage of the Gross National Product has been projected to continue through 1980. The average rate of change from 1965-1980 is expected to exceed 5 per cent annually. These projections indicate that nearly 30 per cent of our GNP will be represented by services by 1980. Presently, if transportation, communication, utilities, finance, insurance, real estate and government are included, the service sector already accounts for about 45 per cent of our total GNP.[8]

A multi-client study conducted by Chemical Business

[4] Victor R. Fuchs, *The Growing Importance of the Service Industries*, National Bureau of Economic Research, New York, 1965.

[5] Crocker National Bank, *Skills in the Labor Force in California*, San Francisco, California 1970.

[6] "Good Growth For Services" in *Financial World*, Oct. 11, 1972.

[7] George J. Stigler, *Trends in Employment in the Service Industries*, Princeton University Press, Princeton, N.J., 1956.

[8] U.S. Dept. of Labor, Bureau of Labor Statistics, *The U.S. Economy in 1980*. Bulletin 1673, Table 1.

Development Co. anticipates an even more spectacular increase, stating that:

> . . . soon the service industries will represent more than half the GNP. Currently, growth is at a rate of 8.2% a year, leading the manufacturing industries which are growing at 6.2% a year. Over the past ten years, the GNP has grown by 6.8%.[9]

The most recent Census of Business as reported by the U.S. Department of Commerce confirms this remarkable growth trend of the service sector. In the nine-year period from 1958 to 1967, "services" showed an overall increase in receipts of 83 per cent for the nation as a whole and 109 per cent for the State of California. Within this division, "Miscellaneous Business Services" (SIC 73) showed the greatest increase of all Services, expanding in receipts by 128 per cent on a national basis and by 154 per cent in California.[10]

C. *Growth of Contracted Building Cleaning and Maintenance Services*

Contracted building maintenance service is one of the fastest growing industries in the United States today. Increasing urban concentration coupled with an ever-growing tendency on the part of businesses to "contract out" their office and plant cleaning needs have led to a current industry growth rate of 15 per cent.[11] The market for commercial, institutional and industrial cleaning services is expected to double in the four years, from 1972 receipts amounting to over $1 billion to estimated 1976 receipts of more than $2 billion.[12]

In 1963 only about 15 per cent of the nation's office buildings and industrial plants were cleaned by outside contractors, but by 1968 this figure had doubled to 30 per

[9] "Mandate for the Future" in *Business Services Contractor*, June 1972.

[10] U.S. Department of Commerce, Bureau of the Census, 1963 and 1967 Census of Business.

[11] U.S. Dept. of Commerce, Economic Development Administration, *Urban Business Profile, Building Service Contracting* (SIC 7349), Washington, D.C. 1972. EDA—72-59582.

[12] Building Services Contractor, 101 West 31st Street, New York, N.Y. 10001.

cent.[13] In that year 95 per cent of the post war-built office buildings in New York City were being maintained by service companies.[14]

Major cities offer tremendous opportunities for expansion of the building services industry but the lion's share is being grabbed up by the large corporations because only substantial companies can bid competitively for high-rise office buildings and vast sprawling industrial complexes. Five years ago it was estimated that about 58 per cent of the large buildings in Los Angeles already employed contracted cleaning.[15]

Although many janitorial maintenance service businesses are small proprietorships, these firms account for only a very small proportion of the industry's total receipts. In 1963 about half these firms (the larger ones with payroll) accounted for over 95 per cent of the industry annual receipts. Since 1963 the trend has been towards a greater concentration within the industry and the larger establishments are accounting for a greater portion of receipts.[16]

In 1967 Census of Business provides statistics which show that approximately 10 per cent of the SIC 7349 establishments in the United States operated with no paid employees in addition to the proprietor and perhaps members of his family. These one-man firms accounted for only 2 per cent of the total industry earnings. By comparison about 3.4 per cent of the firms (each with earnings of more than one-half million dollars) accounted for 51.6 per cent of the industry total receipts. Within this group of 322 firms, there were 133 firms with receipts of $1 million or more. Thus 1.4 per cent of all firms accounted for nearly 36 per cent of the industry total receipts in 1967.[17]

A study conducted by Touche Ross & Co. of Minneapolis in December 1971, relying on surveys made by *Sanitary*

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[13] U.S. Dept. of Commerce, *Urban Business Profile, Building Service Contractor.*

[14] Cobleigh, in *Commercial & Financial Chronicle,* Oct. 3, 1968.

[15] Cobleigh, in *Commercial & Financial Chronicle,* Oct. 3, 1968.

[16] U.S. Dept. of Commerce. *Urban Business Profile, Building Service Contracting.*

[17] U.S. Dept. of Commerce, Social and Economic Statistics Administration, *1967 Census of Business,* "Selected Services Special Report, Establishment and Firm Size," June 1972.

Maintenance Magazine in 1966 and 1971,[18] shows that in the five-year period the volume of business in contracted cleaning in the United States had increased 45.8 per cent. This was a more rapid rate of growth than the increase in the number of firms in the industry which only rose by 16.7 per cent in the same period. At the same time, it shows that firms with more than $1 million in sales increased their share of the contract cleaning market from 28.7 per cent to 42.9 per cent during the 1966-1971 period.[19]

Expansion of the SIC 7349 category has been dramatic. During the 1958 to 1967 period its receipts increased by 324 per cent at the national level. By 1967, the Los Angeles County SIC 7349 establishments accounted for 8 per cent of all U.S. receipts.[20]

II. Cleaning and Maintaining Commercial and Industrial Buildings Constitutes An Integral and Essential Part of Business Operations

The function of plant and office building maintenance occupies an important and necessary place in the overall operation of nearly all large businesses. It must be performed as a constituent part of the process of production of the ultimate product. Like design, engineering and data processing services, it must be integrated into the overall system of production.

Large industrial firms frequently face the decision of whether to purchase a product or service on the open market or whether to fabricate or supply it from within the company itself. This "Make-Buy" decision usually depends to a large degree upon which method of procurement is most economical. The same standards of quality must be applied to both methods. Once a decision is made to "Buy" a product or service, the function performed by the contractor who provides it is integrated into the system of manufacture just as completely as it would have been had the firm decided to "Make" it.

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[18] *Sanitary Maintenance* Magazine's report *A Survey of the Sanitary Supply Market* (1966) and the unpublished figures from a survey conducted by *Sanitary Maintenance* in 1971.

[19] Touche Ross & Co. *A Discussion of Future Trends in the Sanitary Supply Industry,* Dec. 1971.

[20] U.S. Dept. of Commerce, Bureau of the Census, *1967 Census of Business.*

This "Make-Buy" choice is important because a significant portion of many national firms' operating costs goes for building maintenance. Custodial services are accounting for an increasing proportion of the cost of operation of office buildings. A 1963 article analyzing the pros and cons of contract cleaning it was estimated that:

> . . . cleaning represents one-fourth to one-third of the operating cost of an office building. It requires serious and unprejudiced thinking to resolve the present dilemma of burgeoning expenses, labor woes, and demands for higher appearance levels by today's sanitation-conscious public.[21]

More recent articles in "Financial World" estimate that 50 per cent of the cost of operating an office building goes for cleaning and maintenance. A 1970 article stated:

> One of the main reasons for the growth of the five big maintenance firms is that it's cheaper to contract for such services than to hire people and have them do the work. When a building owner contracts for the cleaning and maintenance of his property, he need not worry about payrolls, federal, state and local income tax returns, labor relations and the whole range of management supervisory and bookkeeping problems. If the maintenance firm does the job well, the advantages to property owners are indisputable. Even with contracted cleaning and maintenance, it was estimated that 50 per cent of the cost of operating an office building goes for these necessities.[22]

Another article published in 1972 stated:

> Many of the leading companies in this field are the outgrowth of long established janitorial firms that have blossomed as more and more buildings have found the costs associated with 'in-house' cleaning prohibitive. The ability of outside maintenance companies to supply efficient manpower has lead these buildings to contract for housekeeping requirements, which account for up to 50 per cent of their operating costs.[23]

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[21] Edwin B. Feldman, "Cleaning at the Crossroads: Contract or Staff" in *Buildings*, February 1963.

[22] "Maintaining a Profits Uptrend" in *Financial World*, Jan. 7, '70.

[23] "Good Growth for Services" in *Financial World*, October 11, 1972.

The fact that custodial and other maintenance services may be subcontracted in no way detracts from their significance; rather, the fact that subcontracting these services is frequently advantageous may well be considered an indication of their importance. Subcontracting for design and engineering services does not denigrate them nor does it divorce their constituent function from the ultimate product. In like manner, the function of building maintenance and custodial service remains an essential, vital and integral part of the process of doing business.

Custodial services contracting firms usually do a better job for less money than the building owner can do. Ever increasing numbers of large office building owners and manufacturers, particularly the larger ones, with complex, extensive plants prefer to rely upon professional janitorial and maintenance contractors rather than retain an in-house staff for that function. Establishments devoted solely to cleaning and maintenance can utilize more advanced and costly equipment and can rely more heavily upon specialization of labor.[24]

Recent articles in financial journals and trade papers reflect the growing tendency to subcontract cleaning and maintenance activities. The main selling point offered by cleaning specialists is that the business management can concentrate on increasing the profit ratios without having to worry about maintenance and housekeeping chores.

Purchasing Magazine says:

> Rising costs of plant maintenance and the shortage of skilled craftsmen are causing purchasing managers to take a second look at outside contractors. The objective: to determine if contract maintenance is a better deal on price and service than doing it yourself.
> . . . some observers forecast that by the '80's, a majority of companies will have switched to some form of contract maintenance.[25]

Building Services Contractor Magazine reported that the total maintenance concept is finding increased acceptance among member companies of the National Association of

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[24] U.S. Dept. of Commerce, *Urban Business Profile, Building Service Contracting.*

[25] Tom Finnegan, "Maintenance—Leave it to the Pros" in *Purchasing Magazine*, Apr. 30, 1970.

Building Service Contractors (NABSC). The article states that:

> According to the NABSC 1970 *Industry Management Survey,* 54 per cent of the firms replying provide total maintenance services, defined as any and all services involved in the cleaning and maintenance of buildings and their surroundings. Of these, 76 per cent handle complete interior services, including carpet cleaning, floor cleaning and refinishing, furniture polishing, light cleaning and relamping, upholstery and drapery cleaning, and wall cleaning, and 35 per cent, full exterior services—lawn maintenance, parking lot maintenance, sand blasting/cleaning, snow removal, window caulking, water proofing, and the like.[26]

There is an obvious need for a close working relationship between the cleaning and maintenance contractor and the client firm in order to coordinate and integrate the custodial functions with the other activities of the concern. Plant maintenance services logically fall under the direct supervision of production management.

In many important instances very high quality cleaning and custodial services are vital to a production process, as, for example, when very sensitive electronic equipment must be assembled, tested or operated in "clean rooms". The maintenance of these facilities requires exceptionally high standards of care and cleanliness and the work itself involves specialized training, techniques and equipment.

The close relationship of the contract janitorial maintenance services to the recipient of these services is well stated in a leading building management magazine:

> In the most successful management-contractor relationship—successful, that is from the standpoint of standards vis a vis costs—the contractor is not a subservient outsider, a target for management pot-shots and a convenient scapegoat when problems arise. *The contractor is an integral and important member of the management team.* He has been selected by management after careful study of his organization, his financial stability, his experience and reputation, his top management personnel, his local

[26] NABC Regroups to Expand" in *Building Service Contractor* for June 1971.

> management personnel, his policies, his research and training programmes and his labour relations.[27] (Emphasis added.)

III. Conclusion

The work performed by ABMI and the Benton Corporations is part of the Service Sector of the economy which includes establishments providing services to other businesses.

Growth of the Service Sector has far out-performed that of the economy as a whole, having doubled in the last ten years.

The function of building maintenance and cleaning is an integral and essential part of all large businesses regardless of whether this function is performed in-house or contracted-out.

The Building Services Industry is evolving towards a total maintenance concept which can account for up to 50% of office and plant operating costs.

The Building Services Industry, in which the Benton Corporations are involved, has had phenomenal growth in recent years (324% from 1958 to 1967) and is one of the fastest growing in the U.S.

The structure of the Building Services Industry is such that the large firms (earnings in excess of $500,000 yearly) which comprise only 3.4% of the total, dominate the market by accounting for 51.6% of the dollar volume of business.

The fact that only large, substantial companies can bid competitively for contracts involving extensive services has tended to encourage mergers with a resultant concentration in the Building Services Industry.

The trend towards larger Building Services enterprises which are national in character rather than local or regional has a strong tendency to restrict competition.

/s/ Philip Neff
Philip Neff

(Jurat Omitted in Printing)

[27] Steward G. Paul, "Contract Cleaning in Canada," in *Skyscraper Management*, March 1970.

Affidavit of Dr. John D. Gaffey

John D. Gaffey, being first duly sworn, deposes and says:

I have been a professional economist for thirty-five years. I received a B.A., Summa cum Laude, with Honors in Economics, from Ohio State University in 1935, an M.A. in Economics from Ohio State University in 1935, and a Ph.D. in Economics from Columbia University in 1940. My training as an economist emphasized economic history and statistics, finance, labor relations and industrial organization, and the structure and functioning of markets, particularly the study and analysis of competition and monopoly and their effects upon supply, demand, and prices in individual industries and upon our economic system.

For about twenty-five years I have been an economist in the Antitrust Division of the United States Department of Justice. My main work since 1948 has been the discovery and compilation of facts and the analysis and presentation of economic and statistical data in the course of investigations of suspected violations of the antitrust laws. I have conducted and supervised many studies and have prepared numerous economic and statistical analyses, reports and exhibits for use in antitrust investigations, hearings and trials. I have testified in court in several antitrust cases, have given my deposition under oath and have filed affidavits in other cases, and have appeared as a witness before grand juries investigating antitrust matters. During the past several years, I have spent about half of my time in investigations and cases involving mergers and acquisitions by corporations of the stock or assets of other firms.

Prior to my present employment, I served as an economist for other Government agencies, including the United States Department of Commerce, the Office of Price Administration, and the Board of Regents of the State of New York.

I have also taught economics and business administration at the college or university level for several years. In 1947-48, I was Head of the Department of Marketing of the School of Commerce of the University of Southern California, and continued to teach part-time in the Marketing Department and more recently in the Economics Department of the University of Southern California until 1965. From 1938 to 1942, I was an Instructor in Economics and Business Administration at Rensselaer Polytechnic Institute in Troy, New York. From 1935 to 1938, I was a Fellow

of the Social Science Research Council. I am a member of the American Economic Association, and Western Economic Association, the Southern California Economic Association, the Society of Government Economists, the Research and Education Committees of the Los Angeles Chamber of Commerce, and Phi Beta Kappa. My publications include one book, one monograph, and several articles on economic subjects.

In the course of my employment in the Antitrust Division, it has been one of my official duties to investigate and report upon the characteristics of and economic functions performed by Benton Maintenance Company (Benton Maintenance) and J. E. Benton Management Corporation (Benton Management) and the impact of American Building Maintenance Industries' (ABMI) acquisition of these companies upon competition in the areas they serve.

My investigation has included an examination of numerous documents, records and reports submitted to the Antitrust Division of the United States Department of Justice in connection with this acquisition and various other relevant public reports and records. A substantial part of my investigation has been directed to analysis of the purchases and sales of Benton. On the basis of such information, and my own knowledge and experience, I have developed the facts and figures which are summarized below:

1. *Interrelationships of Benton Maintenance and Benton Management (Collectively "Benton")*

Prior to their acquisition by ABMI, Benton Maintenance and Benton Management were California corporations which provided janitorial maintenance contracting services to customers in the Los Angeles area. They both operated out of the same office, 3727 West Olympic Boulevard, Los Angeles, California, and used the same telephone switchboard. From 1958 to June 30, 1970 these two companies were operated primarily by members of the Benton family. Jess E. Benton, Jr., Jess Benton, III and Robert Benton were employed by both corporations in the period immediately prior to the acquisition of these companies by ABMI. Jess E. Benton, Jr. owned all of the stock of Benton Management and 85% of the stock of Benton Maintenance. Robert Benton owned 10% of the stock of Benton Maintenance.

Benton Management leased an NCR 500 business computer in 1969 and it and Benton Maintenance both used it and purchased forms for use with it in 1969. The two Benton companies had many other common suppliers of materials and equipment, including most of their larger suppliers. The purchase of janitorial supplies was negotiated for both corporations together. Although they were paid for separately by each corporation according to its requirements for supplies, many suppliers did not distinguish between the two companies and could not separate their sales to the two companies.

The two Benton companies made many promotional and sales efforts which referred to them jointly or indistinguishably as "Benton" or the Benton enterprises. Such sales promotional materials often stressed the family control of the Benton companies, without distinguishing between the two firms. Many customers and competitors of Benton Maintenance and Benton Management simply referred to them as "Benton" and did not distinguish between the two companies.

For purposes of economic analysis of their activities and functions and the effect of ABMI's acquisition of these companies Benton Maintenance and Benton Management may be treated together as Benton.

2. *Increasing Concentration In The Janitorial Services Contracting Business In The Los Angeles Area*

ABMI is a California corporation which directly and through subsidiaries conducts janitorial maintenance contracting services in 16 states and in Canada. Its total revenues in the fiscal year ending October 31, 1972 were $101,338,000, of which $71,948,000 were from janitorial maintenance services. At the time it acquired Benton, ABMI was the third largest janitorial maintenance contracting firm in the United States, and the leading firm in this business in the Los Angeles area. ABMI has maintained and enhanced its position in this industry nationally and in the Los Angeles area by an aggressive program of acquisition of other companies. During the period 1961 through 1970, ABMI acquired the following direct competitors in the janitorial maintenance contracting industry in the Los Angeles area: Co-Lena Corporation of Los Angeles, California; Pioneer Building Maintenance Co., Los Angeles,

California; Long Beach Building Maintenance Company, Long Beach, California; Santa Ana Building Maintenance Company, Santa Ana, California; Crosetti Bros., Inc., operating in Los Angeles and San Francisco, California and in Portland, Oregon; and Benton Maintenance and Benton Management, Los Angeles, California. In December 1968, Benton acquired California Building Maintenance Co., Los Angeles, California. This business was acquired by ABMI when it acquired Benton.

ABMI has also acquired janitorial supply firms in this area, notably: Easterday Supply Company of California, 1961; Advance Chemical Co., 1961; Southland Janitorial Supply, 1971 and Service Supply Co. of Los Angeles, 1973.

In addition from 1961 to date, ABMI has made the following acquisitions of janitorial maintenance service contracting firms operating in United States areas other than Southern California: American Building Maintenance Co. of Michigan, Inc.; American Building Maintenance Co., Ltd.; American Building Maintenance Co. of Indiana; San Jose Building Maintenance Co.; White Glove Maintenance Service; A. A. Porter Service, Inc.; Bonded Maintenance Co. (a Texas corporation); Janitorial Services, Inc. (a Georgia corporation); American Building Maintenance, Tucson, Arizona; Central Business District Service Co.; Mr. "M" Co., Denver, Colorado; Packard Maintenance Co., Detroit, Michigan; Triangle Maintenance Corp., Nebraska; V & W Maintenance Co., Santa Clara, California; Cleaning Services, Inc., Washington, D.C.

During the period 1966 to date, ABMI has also made the following acquisitions of firms operating in the United States in lines of business providing services which are complementary to or frequently associated with janitorial maintenance service contracting: Commercial Air Conditioning Co. of the East Bay; Commercial Air Conditioning of North California, Inc.; Rose Extermination Co.; Whittier Air Conditioning Co. in Orange County, California; General Elevator Corp.; Mabrey Air Conditioning Service in Fresno; Valet Parking Services, Inc. (a California corporation); Bell & Hughes, Inc., Fresno, California; Oser Exterminating Co., Colorado; Federal Air Conditioning, Inc. of Los Angeles; Harry M. Barnes Co., San Jose, California; American Air Conditioning Co.; Automatic Dust Prevention, Inc., San Francisco Bay Area; AMPCO Auto Parks, Inc., Los Angeles, San Jose, San Francisco,

San Diego, Fresno and Dallas; Holbrook Refrigeration, Inc., Los Angeles; Commercial Consulting Co.; Sign Maintenance, Inc., Los Angeles; Sign Maintenance of San Diego, Inc.; Apex Sign Corp.; Hogan's Patrol Service, Houston, Texas; Foster Elevator Co., Houston, Texas; American Building Maintenance Carpet Service; Air Filter Sales & Service Co., Inc.; A-1 Guard Service, Los Angeles; Termite Control Co., Modesto, California; Bill Aul Pest Control, Yuba City, California; ABMI Security Service; SMI Industries.

Thus, altogether from 1961 to date, ABMI has made at least 54 acquisitions of firms in the janitorial maintenance service contracting and related lines of business in the United States.

ABMI's 1968 annual Report announced "a stepped-up program of acquisitions into complementary fields of maintenance service." Then on December 6, 1971 Mr. Sydney Rosenberg, President of ABMI in a speech to institutional investors sponsored by F. S. Smithers & Co., New York, N.Y., stated "We have been buying four—six companies a year. I would say in the future it would be fair to estimate that we will buy between six and eight companies a year."

During the course of my employment on this matter, I have also directed a study of the market structure of the janitorial contracting services industry in the Los Angeles area. It reveals a significant increase in market concentration in this industry in the Los Angeles area in recent years. This increase in concentration has been aggravated by the acquisitions of ABMI in this area referred to above as well as by other acquisitions of local firms by larger national firms. Among the more significant of such other acquisitions are the following: National Kinney Corp. (and predecessors and successors) acquired Security Maintenance Services, Inc., Los Angeles in 2-63; State Maintenance Company, Los Angeles in 12-65; Western Building Maintenance Co. in 12-66; Coast Building Maintenance Company, Inc. in 4-67. Prudential Building Maintenance Corp., 1430 Broadway, New York, N.Y. 10018 acquired Monarch Building Maintenance Co., Inc., 3401 W. Jefferson Blvd., Los Angeles, Ca. 90019 on 5-20-68. Bekins Co., 1355 So. Figueroa St., Los Angeles, California acquired Pierose Building Maintenance Co., 1401 W. 8th St., Los Angeles, California on 9-15-69. International Telephone & Telegraph Corp., 320 Park Avenue, New York, N.Y. 10022 acquired White

Glove Building Maintenance, Inc., 5285 W. Washington Blvd., Los Angeles, California in 1-71.

The United States Department of Commerce in April 1972 stated:

> "The trend today is toward greater concentration within the industry. That is, while there are still a great many small establishments, larger establishments are accounting for an ever greater portion of the gross receipts."[1]

This trend has been caused in part by the other acquisitions of ABMI referred to above. Numerous acquisitions of small to medium-sized firms in the janitorial service contracting and related industries by other industry leaders have also contributed significantly to this trend. National Kinney Corp. (and predecessors and successors) became one of the two leading firms in janitorial service contracting industry largely as a result of some 60 acquisitions between 1962 and 1966. A United States Department of Justice Antitrust suit filed in 1965 and settled by consent judgment in 1966 required the defendant to make a substantial divestiture in the New York area and enjoined it from further acquisitions in that area for 5 years.

Allied Maintenance Corporation, the other largest firm along with National Kinney, in the industry, acquired at least 19 other firms during the period 1961 to date.

Sanitas Service Corp., fourth largest firm in this industry nationally has acquired at least 37 other firms during the past 6 years.

3. *Economic Importance of Southern California*

"Southern California" is defined in the *United States* v. *American Building Maintenance Industries* Complaint as "the area encompassed by Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara and Ventura Counties in the State of California." This area had a population in 1970 of 10,235,000 persons, which was over 5% of the population of the United States in 1970. Southern California has the second largest concentration of population and business in the United States, being exceeded only by

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[1] Urban Business Profile, Building Service Contracting, SIC 7349, U.S. Department of Commerce, Economic Development Administration, Office of Minority Business, April, 1972, EDA-72-59582, page 4.

the greater New York area. Its population in 1970 was more than the combined total of 14 states (Alaska, Wyoming, Nevada, Vermont, Delaware, North Dakota, South Dakota, Montana, New Hampshire, Hawaii, Rhode Island, Maine, New Mexico and Washington).

During the decade from 1960 to 1970, this was the leading growth area in the United States. During that period Los Angeles County had the greatest increase in population of any county in the United States, and Orange County was second in that respect.

This is a highly developed urban area of very substantial economic importance. It has more than 4,000,000 gainfully employed persons of whom about 950,000 are engaged in manufacturing. It gives rise to a gross regional product of about $62 billion a year and personal income of its residents of about $50 billion annually. The annual volume of construction in this area exceeds $4 billion. In Southern California, there are commercial bank deposits of about $22 billion, nearly 7 million motor vehicles, about 7 million telephones, and 5 million television sets. This area has wholesale trade of about $33 billion and retail sales of nearly $23 billion per year. Its foreign trade includes imports of about $3 billion and exports of more than $2 billion per year.

This area also has the greatest aggregation of advanced technology industries (e.g. aerospace, electronics, scientific instruments, and scientific research and development) in the United States, and contains the greatest concentration of scientists, engineers, mathematicians and related skilled technicians in this country. It also leads the nation in the entertainment industry, including television, radio, motion pictures, records and tapes.

If Southern California were a separate nation, it would rank 11th in the world in total gross value of production. Only the United States, U.S.S.R., Japan, West Germany, France, United Kingdom, Italy, China, Canada and India produce more. The gross value of production in Southern California is almost as large as the entire gross product of India which has about 50 times as many inhabitants.

4. *Benton's Purchases Originating in Interstate Or Foreign Commerce*

Benton's total purchases were slightly more than $615,000 in 1969, the last full year prior to the acquisition. They were distributed as follows:

Benton Maintenance	$306,702
Benton Management	308,717
Total	$615,419

These purchases were made from about 200 suppliers.

I made a detailed analysis of the sources of the purchases of 8 of Benton's larger suppliers. Benton's purchases from these 8 suppliers in 1969 were $314,205 and they accounted for 51% of Benton's total purchases in that year. Benton's purchases from these firms which originated outside of California are set forth in Table 1. These data indicate that at least 38.4% of Benton's purchases in 1969 came from out-of-state sources. Application of this type of analysis to other suppliers would almost certainly reveal additional purchases from out-of-state sources.

TABLE 1

PURCHASES OF BENTON
ORIGINATING OUTSIDE OF CALIFORNIA IN 1969

Supplier	Benton's Out-of-state Purchases 1969
National Sanitary Supply Co.[1]	$ 69,661
Los Angeles Department of Water & Power [2]	62,651
Ball Industries [3]	37,400
Courtesy Chevrolet [4]	21,902
National Cash Register Company [5]	13,986
Westinghouse Electric Corporation [6]	13,753
Preferred Distributing Company [7]	12,954
Southern California Gas Company [8]	4,550
Total	$236,857

[1] Schedules of "Benton Management Suppliers, 1969" and "Benton Maintenanc Janitoral (sic) Suppliers, 1969" furnished to U.S. Department of Justice, Antitrust Division by Anthonie M. Voogd, Esq., attorney for ABMI and affidavits of Robert B. Garber and Max Tolbert.

[2] Schedule of "Benton Management Suppliers, 1969" and Affidavits of Duane L. Georgeson, Thomas A. Nelson, and James B. Krieger.

[3] Affidavit of Irving A. Singer.

[4] Affidavit of Ross Callahan.

[5] Affidavit of Richard Fields.

[6] Affidavit of David T. Hannah.

[7] Affidavit of Victor Cano.

[8] Schedule of "Benton Management Suppliers, 1969" and Affidavit of J. Frank Turbeville.

5. *Benton's Revenues Derived From Janitorial Services To Customers In Los Angeles And Orange Counties, California, Which Were Engaged In Interstate and Foreign Commerce*

In 1969, Benton Maintenance derived about 80% and Benton Management derived about 91% of its janitorial service revenues from customers engaged in interstate and foreign commerce. Benton Maintenance's total revenues from this source in that year were about $4,180,000 and Benton Management's revenues from this source were about $570,000 in 1969. Further details on this subject are set forth in Table 2 below.

The principal interstate and foreign customers for which Benton provided such services which resulted in payments to Benton of $10,000 or more in 1969 are listed in Appendix A.

6. *Benton's Interstate and Foreign Correspondence*

During the period January 1, 1969 until ABMI's acquisition of the Benton companies on June 30, 1970, the Benton

TABLE 2

JANITORIAL SERVICES REVENUES OF BENTON MAINTENANCE COMPANY AND J. E. BENTON MANAGEMENT CORPORATION DERIVED FROM CUSTOMERS IN LOS ANGELES & ORANGE COUNTIES, CALIFORNIA ENGAGED IN INTERSTATE AND FOREIGN COMMERCE IN 1969

	Benton Maintenance Co.	Benton Management Corp.	Total Benton Companies
Revenues from Customers Engaged in Interstate and Foreign Commerce	$4,184,449	$571,393	$4,755,842
Revenues from Other Customers	$1,068,827	$ 52,504	$1,121,331
Total Revenues	$5,253,276	$623,897	$5,877,173
Per Cent From Out-of-State	79.7	91.6	80.9

Sources: Exhibits C, F & H filed by ABMI June 9, 1971, pursuant to Protective Order entered June 2, 1971.

companies engaged in extensive interstate and foreign correspondence. They used the interstate mails in correspondence with many customers, prospective customers, suppliers, Government agencies and others. Benton also received a substantial volume of correspondence from out-of-state sources during this period.

The following is a list of such documents, copies of which have been received by the Antitrust Division of the United States Department of Justice.

No.	Date	Description
1	1-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa., to Texaco c/o Benton.
2	2-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa., to Texaco c/o Benton.
3	2-14-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh Pa.
4	3-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa., to Texaco c/o Benton.
5	3-14-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
6	3-18-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
7	4-3-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
8	5-69	Westinghouse Electric Corporation Protective Maintenance Agreement (Jersey City, N.J.) to Texaco c/o Benton.
9	5-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
10	5-9-69	Johnson Control Service Order.
11	5-12-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
12	5-27-69	Letter from H. E. Meyer, New York Life Insurance Company, New York, N.Y. to Jess E. Benton, Jr. of Benton.
13	6-1-69	Invoice from Westinghouse Electric

No.	Date	Description
		Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
14	6-5-69	Letter from Benton to Internal Revenue Service Center, Ogden, Utah.
15	6-6-69	Letter from Jess E. Benton III of Benton to Barton's Candy Corp., Brooklyn, N.Y.
16	6-9-69	Letter from Benton to H. E. Meyer, New York Life Insurance Company, New York, N.Y.
17	6-10-69	Invoice from Johnson Service Company, Milwaukee, Wisconsin, to Benton.
18	6-10-69	Johnson Control Service Order.
19	6-10-69	Johnson Control Service Order.
20	6-10-69	Invoice from Johnson Service Company, Milwaukee, Wisconsin, to Benton.
21	6-10-69	Invoice from Johnson Service Company, Milwaukee, Wisconsin, to Benton.
22	6-12-69	Letter from Carr of Benton to Wm. R. Hawthorne of New York Life Insurance Company, New York, N.Y.
23	6-13-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
24	6-13-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
25	6-17-69	Letter from Rudolph Henkel, New York Life Insurance Company, N.Y., N.Y. to Benton.
26	6-17-69	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to G. V. Carr of Benton.
27	6-19-69	Letter from Jess E. Benton of Benton to Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.
28	6-20-69	Letter from Benton to Rudolph Henkel, New York Life Insurance Company, N.Y., N.Y.
29	6-20-69	Letter from G. V. Carr of Benton to Rudolph Henkel, New York Life Insurance Company, N.Y., N.Y.
30	6-20-69	Letter from H. E. Meyer, New York

No.	Date	Description
		Life Insurance Company, N.Y., N.Y. to Benton.
31	6-23-69	Letter from John V. W. Downing of Benton to Conductron-Missouri, St. Charles, Mo.
32	6-23-69	Letter from Benton to Internal Revenue Service Center, Ogden, Utah.
33	6-25-69	Letter from Jess E. Benton III of Benton to Barton's Candy Corporation, Brooklyn, N.Y.
34	6-25-69	Letter from Jess E. Benton III of Benton to Howard Stores Corporation, Brooklyn, N.Y.
35	6-25-69	Invoice from Ready Made Sign Co., Inc., Long Island City, N.Y. to Benton.
36	6-26-69	Letter from John E. Miller of Benton to Donald L. Hodgson, Sun Music Equipment Company, Tualatin, Oregon 97062.
37	6-23-69	Letter from Donald L. Hodgson of Sun Music Equipment Company, Tualatin, Oregon to Jerry Glenn of Benton. (See No. 36)
38	6-69	Benton Operating Disbursements. (See No. 42)
39	7-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
40	7-3-69	Invoice from Benton to Westinghouse Electric Corp., Pittsburgh, Pa.
41	7-3-69	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, Jr. of Benton.
42	7-7-69	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
43	7-11-69	Letter from G. V. Carr of Benton to Wm. R. Hawthorne of New York Life Insurance Company, N.Y., N.Y.
44	7-14-69	Letter from John E. Miller of Benton to Bill Hart, New York City, N.Y.
45	7-14-69	Letter from Jess E. Benton III of

No.	Date	Description
		Benton to Howard Stores Corporation, Brooklyn, N.Y.
46	7-15-69	Letter from Jess E. Benton III of Benton to Barton's Candy Corporation, Brooklyn, N.Y.
47	7-15-69	Letter from Benton to L.&A. Products, Inc. St. Paul, Minnesota.
48	7-16-69	Letter from H. E. Meyer to Jess E. Benton, Jr.
49	7-18-69	Letter from Rudolph Henkel, New York Life Insurance Company, New York, N.Y. to Benton.
50	7-23-69	Letter from Jess E. Benton III of Benton to Rudolph Henkel, New York Life Insurance Comapny, N.Y., N.Y.
51	7-23-69	Letter from Jess E. Benton III to Rudolph Henkel, New York Life Insurance Company, N.Y., N.Y.
52	7-23-69	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, Jr. of Benton.
53	7-24-69	Letter from James J. Breen of Benton to Consulado Americano, Merida, Yucatan, Mexico.
54	7-25-69	Letter from Jess E. Benton III of Benton to Rudolph Henkel, New York Life Insurance Company, N.Y., N.Y.
55	7-25-69	Letter from Jess E. Benton III of Benton to Rudolph Henkel of New York Life Insurance Company, N.Y., N.Y.
56	7-28-69	Letter from Benton to Mr. Ci Yong Lee, Moscow, Idaho.
57	7-31-69	Letter from John E. Miller of Benton to Anita G. Knight, St. Louis, Mo.
58	8-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
59	8-6-69	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Mo.
60	8-6-69	Letter from Benton to Mr. Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.

No.	Date	Description
61	8-11-69	Letter from Jess E. Benton, Jr. to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
62	8-11-69	Letter from Jess E. Benton, III of Benton to Rudolph Henkel of New York Life Insurance Company, N.Y., N.Y.
63	8-12-69	Letter from John E. Miller of Benton to Screen Gems, N.Y., N.Y.
64	8-13-69	Letter from Benton to Mr. John B. Coman, Tishman Gateway Bldg., Chicago, Illinois.
65	8-15-69	Invoice from Benton to Westinghouse Electric Corp., Pittsburgh, Pa.
66	8-20-69	Letter from John E. Miller, Benton to Screen Gems, New York, N.Y.
67	8-25-69	Letter from J. R. Chubb of Benton to Edgar R. Trigueros, Sonsonate El Salvador, Central America.
68	8-28-69	Letter from Jess E. Benton of Benton to Howard E. Meyer, New York Life Insurance Company, New York, N.Y.
69	8-28-69	Letter from John E. Miller of Benton to Joan L. Ellenbogen, Screen Gems, New York, N.Y.
70	8-29-69	Letter from Ivar S. Gustafson of Benton to Elmer L. Litwin, AMPROP, Inc., Miami, Florida.
71	9-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
72	9-3-69	Letter from H. E. Meyer of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton of Benton.
73	9-4-69	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
74	9-8-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
75	9-9-69	Letter from G. V. Carr of Benton to Internal Revenue Service, Ogden, Utah.
76	9-9-69	Letter from G. V. Carr of Benton to Howard E. Meyer, New York Life Insurance Company, New York, N.Y.

No.	Date	Description
77	9-11-69	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
78	9-22-69	Letter from John E. Miller of Benton to Joan L. Ellenbogen of Screen Gems, N.Y., N.Y.
79	9-22-69	Letter from James J. Breen, Benton, to Consulado Americano, Merida Yucatan, Mexico.
80	9-30-69	Letter from John E. Miller of Benton to Screen Gems, New York, N.Y.
81	9-30-69	Letter from Jess E. Benton III of Benton to Central Pension Fund, Chicago, Illinois.
82	10-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
83	10-2-69	Letter from Jess E. Benton III of Benton to Mr. Don Schain, Walter Reede Organization, N.Y., N.Y.
84	10-7-69	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Mo.
85	10-7-69	Letter from G. V. Carr of Benton to Shell Oil Company, Tulsa, Oklahoma.
86	10-8-69	Letter from John E. Miller of Benton to Donald L. Hodgson, Sunn Musical Equipment Company, Tualatin, Oregon.
87	10-9-69	Letter from James J. Breen of Benton to Consulado Guadalajara, Jalisco Mexico.
88	10-8-69	Letter from Jess E. Benton III of Benton to Mr. Paul F. Barnhart, Houston, Texas.
89	10-16-69	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
90	10-22-69	Letter from John E. Miller of Benton to New York Life Insurance Company, N.Y., N.Y.
91	10-27-69	Letter from Ivar S. Gustafson of Benton to Elmer L. Litwin, AMPROP, Inc., Miami, Fla.

No.	Date	Description
92	10-27-69	Letter from G. V. Carr of Benton to Mr. Ci Yong Lee, Moscow, Idaho.
93	11-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
94	11-5-69	Letter from Benton to Matthew Bender & Co., Inc., Albany, New York 12201
95	11-7-69	Invoice from Benton to Westinghouse Electric Corporation, Pittsburgh, Pa.
96	11-7-69	Letter from G. V. Carr of Benton to Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.
97	11-10-69	Western Union Telefax from New York Life Insurance Co., (George Fearing) to Benton.
98	11-11-69	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
99	11-11-69	Letter from John E. Miller of Benton to George Fearing, New York Life Insurance Company, N.Y., N.Y.
100	11-11-69	Letter from C. R. Bates of Benton to Mr. Gillermo Carpio, Sonsonate, El Salvadore, C.A.
101	11-12-69	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to G. V. Carr of Benton.
102	11-18-69	Invoice from Benton to Westinghouse Electric Corp., Pittsburgh, Pa.
103	11-20-69	Property tax form enclosed with check from New York Life Insurance Company, N.Y., N.Y. to Benton.
104	11-25-69	Letter from Eugene L. Coil of Benton to Johnson Service Company, Milwaukee, Wis.
105	12-1-69	Invoice from Westinghouse Electric Corporation, Pittsburgh, Pa. to Texaco c/o Benton.
106	12-8-69	Letter from G, V. Carr of Benton to Anita G. Knight, St. Louis, Mo.
107	12-8-69	Letter from John E. Miller of Benton to

No.	Date	Description
		Robert R. Richardson, North American Television Associates, New York, N.Y.
108	12-8-69	Telegram from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
109	12-9-69	Telefax from George Fearing, New York Life Insurance Company, N.Y., N.Y., to G. V. Carr of Benton.
110	12-9-69	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
111	12-9-69	Letter from Benton to Francis A. Lump, Jr. Scott Paper Company, Philadelphia, Pa.
112	12-11-69	Letter from G. V. Carr of Benton to Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.
113	12-11-69	Letter from John E. Miller of Benton to Anita G. Knight, St. Louis, Missouri.
114	12-15-69	Letter from H. E. Meyer of New York Life Insurance Company, N.Y., N.Y. to G. V. Carr of Benton.
115	12-22-69	Invoice from Benton to Westinghouse Electric Corp., Pittsburgh, Pa. 15230
116	1-5-70	Letter from John E. Miller of Benton to Mr. Robert R. Richardson, North American Television Associates.
117	1-7-70	Letter from G. V. Carr of Benton to A. E. Adams, Arnold & Adams, cc: Gloria S. Daly, N.Y., N.Y.
118	1-9-70	Letter from G. V. Carr of Benton to Office of Labor-Management & Welfare-Pension Reports, Washington, D.C.
119	1-13-70	Note from G. V. Carr of Benton to Mr. Irving Perotz, Tishman Realty, N.Y.
120	1-14-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
121	1-14-70	Letter from G. V. Carr of Benton to Shell Oil Company, Tulsa, Oklahoma.
122	1-14-70	Letter from G. V. Carr to Director of Internal Revenue, Ogden, Utah.

No.	Date	Description
123	1-14-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
124	1-14-70	Letter from H. E. Meyer of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, Jr. of Benton.
125	1-16-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Mo.
126	1-19-70	Letter from Jess E. Benton III of Benton to Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.
127	1-28-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
128	1-28-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
129	2-2-70	Letter from G. V. Carr of Benton to Howard E. Meyer of New York Life Insurance Company, N.Y., N.Y.
130	2-4-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
131	2-5-70	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to G. V. Carr of Benton.
132	2-9-70	Letter from William R. Hawthorne, New York Life Insurance Company, N.Y., N.Y. to Benton.
133	2-10-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
134	1-11-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
135	2-13-70	Letter from Robert E. Benton of Benton to Donald R. Schain, Walter Reade Organization, N.Y., N.Y.
136	2-16-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
137	2-16-70	Letter from G. V. Carr, Benton, to Wm.

No.	Date	Description
		R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
138	2-16-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
139	2-18-70	Letter from Jess E. Benton III of Benton to William F. Boone, New York Life Insurance Company, N.Y., N.Y.
140	2-19-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
141	2-24-70	Letter from W. F. Boone of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, III of Benton.
142	3-3-70	Invoice from Johnson Service Company, Milwaukee, Wisconsin, to Benton.
143	3-6-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
144	3-6-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
145	3-9-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
146	3-10-70	Letter from John E. Miller of Benton to Ing. Edmund Emge, Austria.
147	3-12-70	Letter from G. V. Carr of Benton to Internal Revenue Service, Ogden, Utah.
148	3-13-70	Letter from G. V. Carr of Benton to Internal Revenue Service, Ogden, Utah.
149	3-18-70	Letter from H. E. Meyer of New York Life Insurance Company, New York, N.Y. to John E. Miller of Benton.
150	3-19-70	Letter from John E. Miller of Benton to Bernard A. Hellman, B. Blumenthal & Co., Inc., New York, N.Y.
151	3-23-70	Letter from G. V. Carr of Benton to Wm. R. Hawthorne, New York Life Insurance Company, N.Y., N.Y.
152	3-24-70	Invoice from Johnson Service Company, Milwaukee, Wisconsin, to Benton.
153	3-25-70	Letter from G. V. Carr of Benton to

No.	Date	Description
		Internal Revenue Service Center, Ogden, Utah.
154	3-25-70	Invoice from New York Life Insurance Company, N.Y., N.Y. to Benton.
155	3-25-70	Letter from John E. Miller of Benton to Anita G. Knight, St. Louis, Mo.
156	3-26-70	Letter from G. V. Carr of Benton to Howard E. Meyer, New York Life Insurance Company, N.Y., N.Y.
157	3-30-70	Invoice from New York Life Insurance Company, N.Y., N.Y. to Benton.
158	4-2-70	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to Benton.
159	4-6-70	Letter from James J. Breen of Benton to American Consulatze General, Vancouver, B.C. Canada.
160	4-11-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Mo.
161	4-15-70	Letter from H. E. Meyer, New York Life Insurance Company, N. Y., N.Y. to Benton.
162	4-21-70	Letter from James J. Breen of Benton to American Consulatze General, Guatemala Central America.
163	4-23-70	Letter from John E. Miller of Benton to H. E. Meyer, New York Life Insurance Company, N.Y., N.Y.
164	4-23-70	Letter from John V. W. Downing of Benton to Federal Electric Corporation, Paramus, New Jersey.
165	4-24-70	Letter from Jess E. Benton III of Benton to Pam Granberg, Key Club Travel Agencies, Inc. Chicago, Illinois.
166	4-27-70	Letter from John E. Miller of Benton to Anita G. Knight, St. Louis, Mo.
167	4-30-70	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to John E. Miller of Benton.
168	4-30-70	Letter from G. V. Carr of Benton to Joint Reporting Committee, Springfield, Va.

No.	Date	Description
169	5-5-70	Letter from H. E. Meyer of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, Jr. of Benton.
170	5-5-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
171	5-11-70	Letter from G. V. Carr of Benton to Gloria S. Daly, New York, N.Y.
172	5-11-70	Letter from G. V. Carr of Benton to David P. McGuey, New York Life Insurance Company, Los Angeles, cc: H. E. Meyer, N.Y.
173	5-12-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
174	5-12-70	Letter from John E. Miller of Benton to Dorothy M. Kratky, St. Louis, Mo.
175	5-4-70	Letter from Dorothy M. Kratky to Benton. (No. 174)
176	5-14-70	Letter from John E. Miller of Benton to Robert R. Richardson, North American Television Associates.
177	5-14-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
178	5-20-70	Letter from James J. Breen of Benton to United States Immigration Department, Mexico, D.F.
179	5-21-70	Letter from G. V. Carr of Benton to H. E. Meyer, New York Life Insurance Company, N.Y., N.Y.
180	5-21-70	Letter from G. V. Carr of Benton to H. E. Meyer, New York Life Insurance Company, N.Y., N.Y.
181	5-21-70	Letter from G. V. Carr of Benton to Ellen S. Arbit, Los Angeles, cc: H. E. Meyer, New York Life Insurance Company, N.Y., N.Y.
182	5-21-70	Letter from G. V. Carr of Benton to Great West Life Assurance Company, Winnipeg, Canada.

No.	Date	Description
183	6-1-70	Letter from H. E. Meyer, New York Life Insurance Company, N.Y., N.Y. to G. V. Carr of Benton.
184	6-3-70	Letter from H. E. Meyer of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton, Jr. of Benton.
185	6-8-70	Letter from G. V. Carr of Benton to Richard F. Ryan of Coldwell Company, Los Angeles, cc: H. E. Meyer, New York Life Insurance Company, N.Y., N.Y.
186	6-11-70	Letter from G. V. Carr of Benton to Anita G. Knight, St. Louis, Missouri.
187	6-16-70	Letter from G. V. Carr of Benton to Internal Revenue Service Center, Ogden, Utah.
188	6-18-70	Letter from Jess E. Benton III of Benton to United States Immigration Department, Mexico, D.F.
189	6-23-70	Invoice from Johnson Service Company in Milwaukee, Wisconsin to Benton.
190	6-24-70	Letter from Jess E. Benton III of Benton to Charles C. Hornbostel, Hooker Chemical Corporation, N.Y., N.Y.
191	6-25-70	Letter from James J. Breen of Benton to British Counsel, British Honduras.
192	2-4-70	Letter from Ing. Edmund Emge, Austria to John E. Miller of Benton (referred to in No. 146).
193	2-26-70	Letter from Bernard A. Hellman of Blumenthal & Co., Inc., N.Y., N.Y. to John E. Miller of Benton (referred to in No. 150)
194	2-11-70	Letter from William Boone of New York Life Insurance Company, N.Y., N.Y. to Jess E. Benton III of Benton (referred to in No. 139)
195	11-24-69	Letter from Francis A. Lump, Jr. of Scott Paper Company, Philadelphia, Pa. to Benton. (referred to in No. 111)

No.	Date	Description
196	11-25-69	Letter from Robert R. Richardson of North American Television Associates, N.Y., N.Y. to John E. Miller of Benton (referred to in No. 107)
197	undated	Invoice from Matthew Bender & Co., Inc. Albany, N.Y. to Benton (referred to in No. 94)
198	9-24-69	Letter from Screen Gems, N.Y., N.Y. to John E. Miller of Benton. (referred to in No. 80)
199	undated	Letter from Elmer L. Litwin of AMPROP, Inc., Miami, Fla. to Ivar S. Gustafson of Benton (referred to in No. 70)
200	3-9-70	Letter from Internal Revenue Service, Ogden, Utah to Benton. (referred to in No. 148)
201	5-5-70	Letter from Internal Revenue Service, Ogden, Utah to Benton. (referred to in No. 173)
202	5-1-70	Letter from Internal Revenue Service, Ogden, Utah to Benton. (referred to in No. 170)
203	12-69	Invoice from Johnson Service Company, Milwaukee, Wisconsin to Benton.

7. *Benton's Interstate Telephoning and Advertising*

During the course of my study of this matter, I found evidence of the following interstate telephone conversations concerning company business between officers or employees of Benton and others:

1. Conversation of January 13, 1970 between G. V. Carr, Treasurer of Benton Management and Retail Credit Card Dept., Shell Oil Company, Tulsa, Oklahoma (referred to in No. 121 in correspondence list above).

2. Conversation of May 9, 1970 between G. V. Carr, Treasurer of Benton Management and Mrs. Gloria S. Daly, New York, N.Y. (referred to in No. 171); and

3. Conversation of June 24, 1970 between Jess E. Benton III and Mr. Charles C. Hornbostel, Hooker Chemical Corp., New York, N.Y. (referred to in No. 190).

The correspondence listed does not state whether these interstate telephone calls were placed by Benton to other persons or vice versa, but these telephone conversations were in addition to the interstate telephone calls placed by Benton listed in the Affidavit of Eugene Coil.

From March through June 1970, Benton received and paid five advertising invoices from Dow Jones & Co., Inc., publishers of The Wall Street Journal, New York, N.Y. Four of them were for advertising in the Pacific Coast Edition and one was for advertising in the Eastern Edition of the Wall Street Journal during this period.

/s/ John D. Gaffey
JOHN D. GAFFEY

(Jurat and Certificate of Service Omitted in Printing)

DEFENDANT'S ADDITIONAL SUPPORTING AFFIDAVITS

(Caption Omitted in Printing)

AFFIDAVIT OF TED CHILDRESS

TED CHILDRESS, being duly sworn, deposes and says:

1. I am presently the Administrative Manager for National Cash Register Company ("NCR") in Los Angeles, and maintain offices at 1940 Century Park East, Los Angeles, California. I was the immediate superior of Richard Fields during the short period of time that he worked at the Century City offices (1940 Century Park East). I was aware generally that the Federal Bureau of Investigation was seeing the affidavit of a National Cash Register employee in connection with this lawsuit.

2. Mr. Fields came to work at the Century City office in June of 1971. Prior to that, he worked for NCR outside California. He thus had no personal knowledge of J. E. Benton Management Corporation, Benton Maintenance Company, or Affiliated Maintenance Company, or their relationship with NCR.

3. I have reviewed the affidavit of Richard Fields and believe the affidavit was based on his review of NCR records. I searched the records of NCR far beyond the lease records, which is all I believe Mr. Fields searched. Attached hereto as Exhibit "A" is a true and complete copy of the lease of the 500 computer referred to in Mr. Fields' affidavit. The computer was leased specifically to J. E. Benton Management Corporation, not Benton Maintenance Company or its predecessor, Affiliated Maintenance Company. The lease is dated June 20, 1966. Attached hereto as Exhibit "B" is NCR's form indicating that this specific computer came from Hawthorne, California, and thus may have been used by another lessee. Originally the computer might have been manufactured in Dayton, although we did have assembly lines in California which I believe may have manufactured the 500. In none of our leases do we claim or represent that the leased equipment will be new.

4. NCR has computer form plants throughout the United States. These plants are designed so that each plant puts out the forms for a specific computer or computers. The records of NCR reveal that in 1966 through 1970 the forms

and paper which would be used in the 500 computer were manufactured in Fullerton, California.

5. The cancellation of the Benton lease notes that J. E. Benton Management Corporation was acquired by American B..ding Maintenance Industries ("ABMI") who was also a 500 user. Our records reveal that ABMI had purchased rather than leased an NCR computer, and that NCR had a maintenance contract on that computer. Since the computer had been purchased rather than leased, the records of its existence and ABMI's use of it would be located in a different place than had it been leased, and this is probably the reason why Mr. Fields did not find the records of the ABMI computer in his search for it.

DATED: November 15, 1973.

/s/ Ted Childress
TED CHILDRESS

(Jurat Omitted in Printing)

NCR

APR 5

COMPUTER USE AND SERVICE AGREEMENT

NCR 500 SERIES ELECTRONIC DATA PROCESSING SYSTEM

NCR REF. NO. 739-6-547

The National Cash Register Company, hereinafter called "NCR," hereby agrees to furnish to

J. E. Benton Management Corporation
Name

located at 3727 Olympic Blvd., Los Angeles, Calif. 90019
Address

hereinafter called the "User," and the User hereby agrees to accept from NCR the use and service of one (1) NCR 500 Electronic Data Processing System, hereinafter called the "System," upon the following terms and conditions:

1. COMPONENTS AND BASIC MONTHLY RENTAL

The System shall consist of the following components and the Basic Monthly Rental shall be as specified below:

MODEL NO.	COMPONENT	NO. OF UNITS	UNIT PRICE	TOTAL
517-1	Central Processor (400 Words)	1	$435.	$435.00
	In-Tape Feature		25.	25.00
	Out-Tape Feature		10.	10.00
	Alpha from Console		25.	25.00
	Magnetic Ledger		130.	130.00
590-1	Console	1	250.	250.00
563-1	50 CPS Tape Reader	1	35.	35.00
572-1	30 CPS Tape Punch	1	60.	60.00
586-1	Ledger Feeder Reader	1	140.	140.00

BASIC MONTHLY RENTAL $1110.00
STATE TAX (3 %) 33.30
☐ CITY ☑ COUNTY TAX (1 %) 11.10
BASIC MONTHLY RENTAL PLUS TAXES $1154.40

CASH WITH ORDER $ 0
FREIGHT CHARGE $180.00
47 Sales Tax 7.20
Total 187.20

F-7167 8-1-67 NCR ☐ NO EFFECT ON PREVIOUS ORDER ☐ AFFECTS PREVIOUS ORDER NCR REF. NO.

LIST PRICE	DATE SHIPPED	SERIAL NO.	
LEASE			130
DO NOT ENTER 435.00	SIZE OR MODEL NO.		FINISH
ONE.		2-1-67	

DO NOT WRITE IN THIS SPACE

DO. 12-19-66 739-6-547-1

SHIP TO: CODE NO.

CHARGE TO:

FROM: CODE NO.

DO NOT WRITE IN THIS SPACE

REASON FOR SHIPMENT

NCR REFERENCE NO.

☐ NEW
☐ RECONDITIONED
☐ FACTORY
☑ MISC.

RETURNED FEB 23 1971

F-4479 7-29-64 NCR BRANCH EQUIPMENT INVENTORY RECORD (3)

AFTER SHIPMENT, FORWARD 1st TWO COPIES TO EQUIPMENT INVENTORY ACCOUNTING DEPT. FORWARD THIS COPY TO OFFICE RECEIVING EQUIPMENT. RETAIN COPY 4 FOR YOUR FILE.

SERIAL NO.	SIZE OR MODEL NO. & FINISH	DATE SHIPPED
7666661	517-1	

BEST COPY AVAILABLE

ertificate of Service Omitted in Printing)

son other than the User, or if the User shall assign or otherwise transfer this agreement, transfer or sublet the System or components thereof, or permit its removal from the premises where originally installed without the written approval of NCR, then, and in each and every instance, if such shall continue for fifteen (15) days after written notice thereof by NCR to the User, NCR, without prejudicing its right to elect any other remedy to which it may be entitled, may elect to terminate this agreement by giving written notice to the User, and shall have the right to immediate possession and removal of the System and components thereof, and the term hereby granted shall cease, determine and come to an end. The title to the System and components thereof shall remain in NCR during the term of this agreement and thereafter.

(b) In the event of the termination of this agreement during the initial term resulting from default by the User, pursuant to (a) above or otherwise, the User shall pay NCR, in addition to the return transportation charges, past due rentals and any other charges due and payable at the time of such termination, liquidated damages in an amount determined by adding the amount of rental specified in this agreement from the date of termination to the end of the initial term.

(c) All drawings, diagrams, specifications and other material furnished by NCR and relating to the use and service of the System, including the information contained therein, shall remain the property of NCR and may not be reproduced or distributed in any way except with the written permission of NCR. The User further agrees to receive in confidence all information relative to the design details, operating characteristics and/or coding systems supplied directly or indirectly by NCR; provided that if the User shall use reasonable effort to maintain such confidence, consistent with the effort which it employs with respect to preservation of its own confidential information, or if such confidential information is disclosed pursuant to judicial or governmental action, the User shall not be liable for any disclosures nevertheless resulting. It is agreed that this restriction shall not apply to any information that may be established to be in the public domain.

(d) Any notice or communication given or required to be given under this agreement shall be in writing to the other party at the address stated below or at the last changed address given by the party to be notified as hereinafter specified.

to the User: J. E. Benton Management Corporation
3727 Olympic Blvd.
Los Angeles, California 90019

The National Cash Register Company

address: 1940 Century Park East
Los Angeles, Calif. 90067
Local Branch Office

to NCR:

Attn: H. C. Keesecker
Branch Manager

Either party may, at any time, change its address for the above purpose by mailing, as aforesaid, a notice stating the change and setting forth the new address.

(e) The entire agreement between the parties with respect to the subject matter hereof is contained in this agreement and no representations or warranties, whether of merchantability, fitness or otherwise and whether express or implied except when made in writing by a duly authorized officer of NCR, shall be deemed to be part of

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NCR

CREDIT
APPROVED
DATE 4-20-16
BY

BEST COPY AVAILABLE

4. SUPPLIES

Monthly rental charges do not include payment for supplies. NCR agrees to sell to User at NCR's then current established prices and upon NCR's regular invoice terms, supplies required for use on the System. Supplies used by User must conform to NCR's Specifications.

5. PAYMENT

The Basic Monthly Rental and any additional use charges shall be billed on a calendar month basis. The Basic Monthly Rental shall be billed monthly in advance and any additional use and service charges shall be billed monthly as accrued. Basic Monthly Rental charges for fractional parts of a calendar month shall be computed at the rate of 1/30th of the monthly charge for each day of such fractional part of the calendar month and the basic hours of operational use permitted shall be computed at the rate of eight (8) hours for each working day in such fractional part of the month.

6. TRANSPORTATION CHARGES

NCR shall invoice User and the User shall pay a transportation charge on all shipments to the place of use plus the actual cost to NCR of rigging and drayage at the place of use. NCR shall make available to the User, at the User's request, NCR's standard transportation charges which are the same for all NCR 500 Series Users within each zone established by NCR and are based on NCR's average costs for transportation to such zones. Upon return of the equipment to NCR, the User shall pay NCR's then effective transportation charge plus actual costs for rigging and drayage at the place of use. NCR shall provide transit insurance. All shipments shall be made in accordance with specifications of NCR.

7. SITE PREPARATION

The User shall furnish prior to delivery of the System and at its own expense, adequate space, air conditioning, humidity control and regulated electrical power in accordance with specifications of NCR. NCR shall advise User in planning and laying out the site and shall supply User with specifications for the site in ample time to permit User to have the site prepared prior to delivery of the System. The User shall provide at the site adequate and suitable working facilities and space for maintenance personnel.

8. CABLES

NCR shall provide one set of Standard length cables for the immediate computer area. If the User requires cables in excess of NCR's standard length, NCR shall provide same provided however that the cost of such cables in excess of the standard length shall be at the User's expense. The length of all cables shall conform to NCR's specifications.

9. RISK OF LOSS

NCR shall assume all risks of physical loss or damage to the System during the term hereof because of the elements, fire, explosion, theft, attempted theft or other cause, with the exception of the willful or wanton misconduct of the User, its agents, servants or employees. In the event of such loss or damage not due to the willful or wanton misconduct of the User, its agents, servants or employees, the User's liability for further rent shall be abated during the time necessary for NCR to repair or replace the System and the term of this agreement shall be extended for a like period.

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-5- EXHIBIT "A"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF BUD McKINNEY

BUD McKINNEY, being duly sworn, deposes and says:

1. I am the President of Preferred Distributing Company. I have read the affidavit of Victor Cano, a vice president of Preferred, filed in this action.

2. In our dealings with the J. E. Benton Management Corporation, Affiliated Maintenance Company and Benton Maintenance Company, we made approximately 95 percent of our sales to them from our inventory. This inventory was maintained by us for our sales to all our local customers. We occasionally specially ordered unusual items for the said Benton companies. *Our* purchases of these unusual items were almost entirely from either factories or warehouses maintained in California.

3. The Benton companies, as individual entities, of course, ceased dealing with Preferred when they merged with ABM. However, we did and still do substantial business with ABM.

DATED: November 19, 1973.

BUD McKINNEY

(Jurat and Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF SYDNEY J. ROSENBERG

SYDNEY J. ROSENBERG, being first duly sworn, deposes and says:

1. I am the President of American Building Maintenance Industries ("ABMI"), the defendant in the above entitled action, and have been employed by ABMI or its predecessors since 1937. I am intimately familiar with the business activities of ABMI.

2. The business which ABMI presently conducts was founded approximately sixty years ago by my father, Morris Rosenberg. My brother, Theodore Rosenberg, and I succeeded to my father's ownership of the business through inheritance and through the purchase of our sisters' interest in the business. ABMI was incorporated in California in 1955 by my brother and me, and now conducts the business founded by my father.

3. I have read the Affidavit of John D. Gaffey ("Affidavit") filed on behalf of the plaintiff in the above entitled action.

The Affidavit states that ABMI acquired American Building Maintenance Company of Michigan, Inc., American Building Maintenance Co. of Indiana, American Building Maintenance Co., Ltd., and Advance Chemical Co. The stock of these companies was contributed to ABMI by my brother and me on September 27, 1961.

The Affidavit states ABMI acquired Easterday Supply Company of California, American Air Conditioning Co., Automatic Dust Prevention, Inc., AMPCO Auto Parks, Inc., Commercial Consulting Co., American Building Maintenance Carpet Service and ABMI Security Services. These companies were not acquisitions of ABMI but were companies that were established by ABMI or became a part of ABMI when it was incorporated.

Attached hereto as Exhibit "A" is a schedule listing the details of the ABMI acquisitions of janitorial companies listed in the Affidavit including the name of the company acquired, the location where it conducted business, the date

it was acquired by ABMI or a wholly owned subsidiary of ABMI, its approximate annual sales at the time it was acquired, the approximate purchase price, and the approximate value of the tangible and intangible assets acquired. The tangible assets generally represent equipment and supplies while the intangible assets generally represent janitorial service contracts terminable by customers on thirty days notice.

Attached hereto as Exhibit "B" is a schedule listing details of the ABMI acquisitions of companies other than janitorial companies listed in the Affidavit, including the name of the company acquired, the location where it conducted business, the date it was acquired by ABMI or a wholly owned subsidiary of ABMI and the nature of its business.

Dated: November 19, 1973.

SYDNEY J. ROSENBERG

(Jurat Omitted in Printing)

EXHIBIT "A"

Janitorial Companies

Company	*Location*	*Sales*	*Date*	*Purchase Price*	*Intangible Assets*	*Other Assets*
		$		$	$	$
Pioneer Building Maintenance Co.	St. Paul, Minnesota	300,000.00	10/1/63	70,665.00	50,848.00	19,817.00
Long Beach Building Maintenance	Long Beach, California	219,982.00	2/1/65	55,295.00	46,184.00	9,111.00
Santa Anna Building Maintenance Company	Santa Ana, California	150,890.00	2/1/65	54,132.00	48,722.00	5,410.00
Crosetti Brothers, Inc.	San Francisco, Los Angeles, California; Portland, Oregon	1,114,000.00	12/1/69	326,010.00	307,940.00	18,070.00
A. A. Porter Services	Miami, Florida	175,000.00	3/1/69	104,804.00	100,804.00	4,000.00
Janitorial Services, Inc.	Atlanta, Georgia	174,430.00	1/1/66	145,000.00	112,800.00	32,200.00
V-W Maintenance Company	Santa Clara, California	368,000.00	11/10/72	129,028.00	128,028.00	1,000.00
Packard Maintenance Company	Detroit, Michigan	300,000.00	2/5/69	80,000.00	68,000.00	12,000.00
Mr. "M" Company	Denver, Colorado	120,000.00	12/1/67	38,100.00	35,000.00	3,100.00
Cleaning Services, Inc.	Washington, D.C.	671,000.00	1/9/72	555,000.00	526,000.00	29,000.00

EXHIBIT "A"

Janitorial Companies

Company	*Location*	*Sales*	*Date*	*Purchase Price*	*Intangible Assets*	*Other Assets*
		$		$	$	$
American Building Maintenance Company	Tucson, Phoenix, Arizona	40,000.00	8/8/66	4,250.00	2,700.00	1,550.00
Bonded Maintenance Company and Bonded Maintenance Company of Fort Worth	Houston, Beaumont, Fort Worth, Texas	850,000.00	5/1/62	175,927.00	172,377.00	3,550.00
White Glove Maintenance Company	Indianapolis, Indiana	120,000.00	2/1/62	5,768.00	5,768.00	-0-
San Jose Building Maintenance Company	San Jose, California	450,020.00	1/1/62	100,000.00	82,500.00	17,500.00
Triangle Maintenance Corporation of Nebraska	Omaha, Nebraska	120,000.00	4/21/69	21,944.00	16,945.78	4,998.22
	TOTALS	$5,173,322.00		$1,865,923.00	$1,704,616.78	$161,306.22

EXHIBIT "B"

Companies Other Than Janitorial Companies

Company	*Location*	*Date*	*Business*
Commercial Air Conditioning of Northern California, Inc.	Sacramento, California; Reno, Nevada	8/8/67	Air-Conditioning Company
Commercial Air Conditioning of East Bay	Berkeley, California	8/8/67	Air-Conditioning Company
Whittier Air Conditioning Company	Orange County, California	5/8/68	Air-Conditioning Company
Mabrey Air Conditioning Service	Fresno, California	12/16/68	Air-Conditioning Company
Bell & Hughes, Inc.	Fresno, California	10/1/69	Air-Conditioning Company
Federal Air Conditioning Company	Los Angeles, California	4/1/70	Air-Conditioning Company
Harry M. Barnes Company	San Jose, California	6/1/70	Air-Conditioning Company
Holbrook Refrigeration	Los Angeles, California	6/9/71	Air-Conditioning Company
Air Filter Sales & Service	California, Michigan, Kansas	7/1/72	Air-Conditioning Company
Service Supply Company	Los Angeles, California	11/1/72	Janitorial Supply Company
Southland Janitorial Supplies	Long Beach, California	6/71	Janitorial Supply Company
Co-Lena Corp. of Los Angeles	Los Angeles, California	9/1/62	Manufacturing Company
Hagans Patrol	Houston, Texas	2/21/71	Guard Company
Apex Sign Corporation	Hayward, California	8/23/71	Sign Company
Sign Maintenance Incorporated	Los Angeles, California	8/23/71	Sign Company
Sign Maintenance of San Diego	San Diego, California	8/23/71	Sign Company
Valet Parking Service, Inc.	Los Angeles, California	8/1/69	Auto Parking Company

EXHIBIT "B"

Companies Other Than Janitorial Companies

Company	*Location*	*Date*	*Business*
Central Business District Service Company	San Jose, California	1/24/67	Auto Parking Company
General Elevator Company	Los Angeles, California	9/4/68	Elevator Company
Bill Ayl Pest Control	Yuba City, California	3/1/72	Pest Control Company
Oser Exterminating Company	Denver, Colorado	1/2/70	Pest Control Company
Rose Exterminator Company	San Francisco, San Rafael, San Jose, Oakland, California	12/1/67 4/20/70	Pest Control Company

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

AFFIDAVIT OF H. ROBERT VANCE

H. ROBERT VANCE, being duly sworn, deposes and says:

1. I am the Manager of Technical Services of National Cash Register Company ("NCR") in the Los Angeles Area. As such, I am the computer expert for the company in this geographic area, and I am familiar not only with the technical aspects of the company, but also the practices and procedures of both our company and those of our competitors. I have been in the computer business for fifteen (15) years. All that time I worked in the technical end, and I became most familiar with our own computer efforts and the efforts of our competition.

2. When NCR leases a computer, the lease rate includes a preventive maintenance program. This program includes all the servicing and repair of the equipment. It also includes all of the maintenance and cleaning of the equipment. The frequency of this service varies with the size of the computer and the peripheral equipment connected with it. In the smallest computers, the service may be no more frequent than once a month, whereas in the larger computers, the service would be daily for several hours per day. There is very little user maintenance of any computer system. Each of our computers and, to the best of my knowledge, each of our competitors' computers is designed with its own built-in air system, which is filtered to keep dust away from the vital parts of the mechanism. It is part of our contract that we change and service the filters in this internal air system. For those people who purchase a computer, the same sort of preventive maintenance service is available on a contract plan from NCR. Additionally, there are private service companies which can provide the technical maintenance necessary. It is absolutely essential that any computer operator, whether he be a lessee or a purchaser, have some sort of advanced maintenance program such as the one NCR offers. All of our competitors have similar preventive maintenance programs built in to their leases. Anyone who did not have the technical preventive maintenance would quickly find that their computer system would fail. All of the critical cleaning must be done by an expert, and there is virtually nothing that can be done by a user short of physical abuse or carelessness which will affect the operation of the computer if it is properly maintained under a good technical preventive maintenance program. The customer's maintenance is only responsible for the physical appearance of the equipment, not anything critical to the hardware.

DATED: November 19th, 1973.

H. ROBERT VANCE

(Jurat and Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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AFFIDAVIT OF JAMES J. BREEN

JAMES J. BREEN, being first duly sworn, deposes and says:

INTRODUCTION

1. I am a Division Manager of American Building Maintenance Company of California ("ABM"), a wholly owned subsidiary of American Building Maintenance Industries ("ABMI"). Prior to the acquisition of J. E. Benton Management Corporation ("Benton Management") and Benton Maintenance Company ("Benton Maintenance") by ABMI, I was a Vice President of Benton Maintenance and a Director of Operations of Benton Management. I was personally involved in operations of both Benton companies and am intimately familiar with the former business activities of those companies.

2. I came to work for Benton Management in approximately 1959. Its primary business was the management of residential, industrial and commercial buildings. It also dealt in real estate as a broker. As part of its management of buildings, it provided services to the building owners which varied depending on the type of building and the requests of the owner. These services included all services necessary for the operation of a building including rent collection, operation of the building systems, maintenance, janitorial services, purchasing of supplies for the account of the owner and the like. As the business expanded, a decision was made to look into maintenance contracting apart from management. Management companies would not hire Benton Management to maintain their buildings because they feared that it, as a management company, might attempt to acquire the management contracts for the buildings. Thus, in 1958 Affiliated Maintenance Company was formed to engage solely in the janitorial services business. The name of Affiliated Maintenance Company was changed to Benton Maintenance Company in 1968.

3. Benton Management provided substantially all of its

building management services pursuant to cost plus fixed fee contracts. These contracts provided that the actual time spent for hours of work were billed to the customers and on top of that was added a fixed management fee which varied depending on the type of building and service offered. The supplies purchased were included in the billing, but these supplies were purchased directly for and owned by the building owner. Frequently, the building owner provided and maintained working capital for operation of its building and Benton Management drew on that working capital to purchase supplies and pay wages. Certain customers of Benton Management desired that all of the costs of operating and maintaining their buildings show on a single account. At their request Benton Management also paid their gas, water and electricity bills and, in the case of Texaco, its elevator maintenance bills, out of the working capital. Attached hereto as Exhibit "A" is a copy of a typical management contract, the contract between Benton Management and Union Oil Company of California.

4. Benton Maintenance provided janitorial services on a bid basis, as did ABM and virtually every other janitorial contracting company with which I am familiar. Under a bid arrangement, the building owner specifies the type and frequency of janitorial services desired. Janitorial contracting companies perform the specified work at the bid price and their ability to make money depends on their ability to forecast expenses in performing the specified services.

T R W

5. I have read the affidavit of Charles V. Engle of TRW, Inc. ("TRW"); I am personally familiar with the work performed by Benton Maintenance for TRW. At TRW's One Space Park, the area referred to in Mr. Engle's affidavit, there were 13 buildings and 2 groups of trailers maintained by Benton Maintenance. The total area cleaned at One Space Park was in excess of 1,560,000 square feet. Of that area, most of the space consisted of offices, hallways, and other similar areas. A smaller, but substantial area, consisted of laboratories and small machine shops. There was only one true clean room at One Space Park. This clean room had an area of 4,000 square feet. In the offices, halls and similar areas, we performed janitorial services of the type performed in all office buildings; vacuuming,

dusting, spot washing, and the cleaning of floors, walls, cabinets and furniture. In the laboratories and machine shops we did mostly floor work. We were instructed by TRW not to touch any machines or anything on benches in the laboratories and machine shops. The work we performed in the clean room was to wash the walls, floor and ceilings. Substantially all of the janitorial services were provided at One Space Park at night when the areas were not in use. However, we had two day people in one of the machine shops who cleaned around workmen. One of these men wiped the machines in the machine shop; he was the only Benton employee who ever touched any machines and he was instructed not to wipe the machines when they were in operation. The other man swept the floors in a machine shop. The one person who worked in the clean room worked during the day.

6. More significant than the clean room were the Environmental Test Chambers at One Space Park. In these chambers TRW created environments matching specific problem environments, such as outer space. These varied from large room-size structures to smaller size enclosures. We were not allowed to clean the interior or exterior of these chambers. TRW had a manufacturing and research building at One Space Park, designated building "M-4", in which we were not permitted, and certainly did not clean. This building was cleaned by TRW's own personnel.

7. In cleaning any building under a bid contract, Benton Maintenance always designed a schedule for the janitors to follow. This was because it would be prohibitively expensive to clean everything each night. For instance, in a typical janitorial crew, we would have one waxer who would do a specific number of square feet each night and our schedule would tell him which area to wax each night. The schedule would be made up by supervisory personnel who would give an assignment slip to the waxer to tell him which area to wax. Other janitors would be given similar assignment slips specifying their work for the night. We made such a schedule for TRW. The supervisory personnel would have to make out a large number of these assignment slips by hand. Because of the size of the facility the time burden imposed by making out these slips was significant. TRW personnel, having seen the time being spent at this task, and having unused computer time, offered to program the computer to print out these assignment slips

for us. Mr. Engle is referring [illegible] intout function when he states at page 3, [illegible] idavit that the computer "produced" the [illegible] computer had no function in the design of t[illegible]

North American Rock[illegible]

8. I have read the affidavits of Charles W. Moxley and John Blain of North American Rockwell ("NAR"), now known as Rockwell International, and am familiar with the work performed by Benton Maintenance for NAR. After 1967 NAR performed its own continuing janitorial work in-house. Benton Maintenance did provide certain janitorial services for NAR on a special bid contract basis. These services consisted of providing window cleaners to dust and clean the high parts of multi-story assembly rooms and other related specialized cleaning. This work was done annually or less frequently. Benton Maintenance did not perform this work each year because the contracts were frequently awarded by NAR to other companies.

Jet Propulsion Laboratory

9. I have read the affidavit of Raymond Hernandez of Jet Propulsion Laboratory ("JPL"); I am personally familiar with the work performed by Benton Maintenance at JPL. The complex at JPL consisted of many buildings on a large acreage. The majority of the space at JPL was office space. Very little of the space at JPL was used for manufacturing machine shop or development work. There was only one true clean room. The only difference between our cleaning of that room and the cleaning that was performed elsewhere at JPL was that we performed the cleaning functions more frequently. JPL maintained environmental space chambers which were of the same type as TRW's Environmental Test Chambers. We were not allowed to clean either the interior or exterior of these chambers. JPL instructed us not to touch the machinery, equipment and material on the tables or work benches in its machine shops or laboratories. In these areas, we did only floor work and the cleaning on desks and other paper work areas. Pursuant to special contracts we would spot wash the walls and dust in areas above the height of a man's reach. Almost all of our work was done at night when there were virtually no JPL employees at the complex.

Tishman Plaza

10. I have read the affidavit of Alan D. Levy of Tishman Realty and Construction Co., Inc. ("Tishman"); I am familiar with the services provided by Benton Maintenance to that company at the Tishman Plaza. Benton Maintenance provided the usual janitorial services at the Tishman Plaza. Tishman hired and fired the engineers used at Tishman Plaza and directed their day-to-day activities, although they were carried on the payroll of Benton Maintenance. Benton Maintenance subcontracted the security work at the Tishman Plaza.

General Telephone

11. I have read the affidavit of Donald E. Del Dosso of General Telephone Company of California ("General"); I am personally familiar with the work performed by Benton Maintenance and Benton Management for General.

12. In approximately 1956, Benton Management was awarded the contract to manage General's headquarters building on Santa Monica Boulevard in Santa Monica, California. Thereafter we provided management and related services at that building. This was the only General building where Benton Management provided management and related services. This building contained only office space.

13. Benton Maintenance provided janitorial services to General in the various other buildings mentioned in Del Dosso's affidavit. Some of these buildings contained switching facilities. In the rooms containing the switching facilities we swept, mopped and waxed the floor, dusted desks and performed janitorial services similar to those we would provide in any other area. The only difference between the cleaning in these rooms and the cleaning Benton Maintenance provided in other areas was that General specifically instructed our janitors not to come in contact in any way with the switching equipment. Additionally, we were prohibited from changing light bulbs or flourescent tubes above or near the switching equipment. Attached hereto as Exhibit "B" is a copy of a typical contract between Benton Maintenance and General. Paragraph 6 at page 13 of that contract provides that Benton Maintenance shall do: "No dusting, washing or vacuuming of base angle, junction to verticles [sic], upright frames, switches, or any portion of

ironwork that supports switching equipment." General itself did all of the cleaning and maintenance of the switching equipment.

Pacific Telephone

14. I have read the affidavit of George G. Guest of The Pacific Telephone and Telegraph Company ("Pacific"); I am familiar with the work performed by Benton Maintenance for Pacific. Benton Maintenance provided janitorial services to various Pacific buildings. Certain of these buildings contained switching equipment. In Pacific's switching equipment rooms we provided the same janitorial services we provided in General's switching equipment rooms. Pacific also instructed our janitors not to come in contact in any way with the switching equipment. Pacific itself or contractors other than Benton Maintenance did all of the cleaning and maintenance of the switching equipment.

Mobil Oil, Union Oil, and Texaco

15. I have read the affidavits of John Stover of Mobil Oil Corporation ("Mobil"), L. B. Higbee of Union Oil Company ("Union") and Edward H. Patotzka of Texaco, Inc. ("Texaco"); I am personally familiar with the work performed by Benton Management for each of them.

16. Benton Management provided building management services to Mobil, Union and Texaco pursuant to cost plus fixed fee contracts. Copies of those contracts are attached hereto as Exhibits "C", "A" and "D", respectively. Benton Maintenance purchased supplies needed to maintain the buildings owned by Mobil, Union and Texaco out of working capital pursuant to the terms of the contracts. Each of these contracts provides that the supplies, tools and equipment purchased for use in the operation and maintenance of the respective building were to be the property of the customer. (Mobil, Exhibit "C", paragraph 7; Union, Exhibit "A", paragraph 6; Texaco, Exhibit "D", paragraph 10.) Additionally, Benton Management paid the fees for Texaco's Protective Maintenance Agreement with Westinghouse (cf., "Westinghouse," *infra*) from Texaco's working capital account. In the rooms in these buildings containing computers we did only floor work and occasionally cleaned desks. We were specifically instructed not to touch the computers themselves, which were main-

tained and cleaned by someone else. The engineers in each building were generally supervised by the respective building owners and the ultimate control over their hiring and firing rested in the respective building owners.

Carnation Company

17. I have read the affidavit of Maynard Heider of the Carnation Company ("Carnation"); I am familiar with the work performed by Benton Management for Carnation. Carnation's headquarters building was maintained pursuant to a cost plus fixed fee contract, similar to contracts with Mobil, Union and Texaco. In the room containing Carnation's computer we did basically floor work with some general cleaning; we had strict instructions not to touch the computer equipment itself.

Teledyne

18. I have read the affidavit of Edmund Sakowicz of Teledyne, Inc. ("Teledyne"); I am personally familiar with the work performed by Benton Maintenance for Teledyne. The only thing Benton Maintenance cleaned for Teledyne on a continuing basis was one floor of one office building in Century City. The entire job merely took 14 manhours per night. With the exception of one small Teledyne building which was cleaned for three or four months, Benton Maintenance never was awarded a contract for any of Teledyne's extensive manufacturing facilities.

Westinghouse

19. I have read the affidavit of David T. Hannah of Westinghouse Electric Corporation ("Westinghouse"); I am personally familiar with the relationship between Westinghouse and Benton Management. Benton Maintenance never had any direct dealings with Westinghouse. Attached hereto as Exhibit "E" is a copy of a protective maintenance agreement between Westinghouse and Texaco. Westinghouse provided continuing elevator service to Texaco pursuant to this agreement. At the request of Texaco and to insure that all costs of operating and maintaining its building showed on a single account, Benton Management paid the fees that were due Westinghouse from Texaco out of the working capital provided by Texaco. Benton

Management did not buy any elevator parts from Westinghouse.

Water, Power, and Gas

20. I have read the affidavits of James B. Krieger of the Metropolitan Water District of Southern California, Duane L. Georgeson and Thomas A. Nelson of the Department of Water and Power of the City of Los Angeles, and J. Frank Turbeville of the Southern California Gas Company.

21. Neither Benton Management nor Benton Maintenance ever contracted to supply water, power, or gas to any customer. The only possible contact that either company would ever have had with any supply of water, power, or gas to customers would be where Benton Management paid bills for such supplies out of working capital provided by customers.

Courtesy Chevrolet

22. I have read the affidavit of Ross Callahan of Courtesy Chevrolet Company ("Courtesy"); I am familiar with all the leasing arrangements between Courtesy and Benton Management and Benton Maintenance. Vehicles were leased as needed by either Benton Management or Benton Maintenance. For instance, the JPL contract required a larger number of vehicles because of the size of the area on which the buildings were situated and the distance between the buildings. Vehicles were leased for terms of two or three years and the total number of vehicles listed by Mr. Callahan in his affidavit are those which were being leased during the calendar year 1969. The leases on those vehicles did not commence in 1969. The demand of Benton Management and Benton Maintenance for vehicles varied depending on the contracts these companies had in force at any given time. These needs could not be anticipated. Both companies were usually able to obtain delivery of vehicles within two or three days after request. Frequently when Courtesy did not have the requested vehicle in their own inventory it would obtain the vehicle from another dealer in the Southern California area.

Ball Industries

23. I have read the affidavit of Irving A. Singer of Ball Industries ("Ball"); I am personally familiar with the

supplies produced by Ball and with the items purchased from Ball by Benton Management and Benton Maintenance.

24. Most of the items purchased by Benton Management and Benton Maintenance from Ball were their own brands of soaps, finishes and waxes. These products were manufactured locally by Ball, although the materials which went into the products may very well have come from out of state. The items that we purchased from Ball were obtained strictly from their local inventory.

National Sanitary

25. I have read the affidavit of Robert B. Garber of National Sanitary Supply Company ("National"); I am personally familiar with the supplies purchased from National by Benton Management and Benton Maintenance. National supplied paper to both Benton Management and Benton Maintenance. The Benton companies purchased virtually nothing else from National. On an occasion when Benton Maintenance was awarded the TRW cleaning contract, after having lost it the previous year, the contractor who was then cleaning TRW would not sell us the equipment it was using. Benton Maintenance needed to buy more equipment strictly for the TRW job. Benton Maintenance made a one-time offer for bids for floor machines, and National was the low bidder. This is the reference made to the Holt floor machines on p. 72, lines 6 and 7 of the government's affidavits. My recollection is that, excluding the one purchase of floor buffers we purchased only four or five items of machinery, including vacuum cleaners, from National since 1950.

26. I have read the affidavit of Dr. John D. Geffey. In my more than fifteen years with the janitorial business, I have become very familiar with the janitorial service contractors doing business in the Southern California area. Prior to its acquisition of Pierose Building Maintenance Co., I had never heard of Bekins Co. directly or indirectly engaging in the janitorial service contracting business in the Southern California area. Nor had I ever heard of National Kinny Corp., its predecessors and successors, engaging in the janitorial service contracting business in Southern California prior to its acquisiton of Security Maintenance Services, Inc. To the best of my knowledge International Telephone & Telegraph Co. also did not engage in the janitorial services contracting business in Southern California prior to its acquisition of White Glove Building Maintenance, Inc. Prudential Building Maintenance Corp. did not do business in Southern California before its acquisition of Monarch Building Maintenance Co., Inc. to the best of my knowledge.

27. The "size" of the janitorial services contractor is related only to the demand of his contracts at that time. When Benton Maintenance first won the TRW contract, its total gross business was less than $500,000 per year; the TRW contract was larger than all of Benton Maintenance's business of the prior year combined. I know of the following small companies which have recently been awarded sizeable janitorial service contracts:

Modern Maintenance:	Jet Propulsion Laboratories
Oriental Lee:	Prudential Insurance Building (470,000 square feet) K-B Development Company Building (175,000 square feet)
Sun Maintenance:	Mutual Engineering Building (190,000 square feet) 4311 Wilshire Building (80,000 square feet)
Merchant's Maintenance Company:	Zenith Insurance Company (220,000 square feet)
Universal Maintenance Company:	The Irvine Ranch Complex

A small contractor was awarded the janitorial services contract for the Hunt's Foods multibuilding complex (more than 270,000 square feet).

Executed this 19 day of November, 1973, at Los Angeles, California.

JAMES J. BREEN

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF GENUINE ISSUES

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF GENUINE ISSUES

I. INTRODUCTION

Plaintiff, United States of America, hereby files its Statement of Genuine Issues under Local Rule 3(g)(c) and pursuant to the Court's order of November 27, 1973.

It should be emphasized, at the outset, that over and above the genuine issues of fact discussed herein, defendant's motion must fail because it is based upon erroneous legal premises. As demonstrated in the Government's Memorandum in Opposition to Defendant's Summary Judgment Motion, filed October 15, 1973, (hereinafter "Government's Memorandum") defendant's legal position cannot be reconciled with the legislative history of Section 7 of the Clayton Act and the governing case law interpreting that statute.

This Statement is submitted to demonstrate that defendant's motion must also be denied because defendant has failed to establish that there are no material issues of fact, even under the restrictive and erroneous legal position which defendant takes.

Clearly the movant in a summary judgment motion must establish the absence of material fact issues. Defendant specifically acknowledged this burden in its moving papers which read in part as follows at pp. 1-2:

> This motion and suggestion are made upon the grounds that there is no genuine issue as to any material fact relating to jurisdiction. . .

It is also well established that in motions such as here presented affidavits and other matters of record must be viewed in the light most favorable to the party opposing the motion and all doubts concerning the existence of a genuine issue of material fact must be resolved against the moving party. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Griffeth* v. *Utah Power & Light Co.*, 226 F.2d

661, 669 (9th Cir. 1966); *A. Cherney Disposal Co.* v. *Chicago & Sub. Refuse Dis. Ass'n.*, 484 F.2d 751 (7th Cir. 1973).

This Statement pinpoints the failure of defendant to meet its burden to establish an absence of genuine issues of material facts. In so doing we emphasize, as more fully shown below, that in our judgment, the affidavits and other materials relied upon by the Government conclusively establish the Court's jurisdiction in this matter. However, for purposes of this Statement we assert that, at the very least, the conflicting affidavits and other evidence placed in the record by the parties raise genuine issues as to material facts. Such genuine issues, standing alone, will of course defeat the defendant's motion.

II. GENUINE ISSUES HAVE BEEN RAISED AS TO WHETHER BENTON WAS ENGAGED IN COMMERCE

The Government asserts that Benton was engaged in interstate commerce by virtue of the services which it rendered, its purchase of interstate supplies, its use of interstate communications facilities to carry out its business and the effect which it had on interstate commerce.

The defendant admits that Benton affected interstate commerce but argues that such effects are irrelevant in determining whether Benton was engaged in interstate commerce. As the Government's Memorandum makes clear, the defendant's position on this issue is unsound as a matter of law and the uncontroverted substantial effects which Benton had on interstate commerce, standing alone, are sufficient to place it in interstate commerce for the purposes of Section 7 of the Clayton Act.

Both parties have, however, placed before the Court affidavits and other materials dealing with Benton's services, purchase of supplies and use of interstate communications facilities. The parties are in disagreement as to what the facts are with respect to these matters and these disagreements raise genuine issues of fact which are material to a resolution of this litigation.

It is clear that a determination of whether Benton engaged in interstate commerce turns upon the factual realities of the market place for "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." *Swift & Co.* v. *United States*, 196 U.S. 375, 398 (1905). Accordingly, we have sub-

mitted to the Court a total of 28 affidavits to establish that, in terms of commercial reality, Benton was engaged in interstate commerce. These affidavits constitute a valid and representative cross-section of those businessmen and experts who have intimate knowledge of the market in which Benton operated: 12 came from officials of Benton customers; 11 came from officials of Benton suppliers; 3 came from officials of former Benton competitors; 2 came from economists who have studied the industry involved.

In support of its motion and in an effort to counter the Government's affidavits, the defendant has submitted a total of nine affidavits. Five came from officers and employees of defendant ABMI; another came from the former Benton owner and officer who received substantial amounts of unregistered ABMI stock; two came from employees of National Cash Register Company; and one came from an official of a former Benton supplier. Significantly, none came from a Benton customer or a competitor of Benton. Moreover, those coming from officers and employees of ABMI and Benton must be considered self-serving, when compared to the large number of affidavits submitted by the Government from members of the industry who have no reason to be biased in favor of the Government.

We believe that an analysis of the record presently before the Court establishes conclusively that Benton was engaged in interstate commerce. In any event, the Court has before it a total of 37 affidavits, running to several hundred pages and containing conflicting testimony on basic questions of interstate commerce. Such a record of conflicting testimony is highly suggestive of genuine issues as to material facts. A fuller consideration of the issues raised in the record establishes with particularity the extent of the genuine issues raised in the record before the Court.

A. *Genuine Issues Have Been Raised as to Whether Benton Was Engaged in Interstate Commerce By Virtue of Services Which it Rendered.*

The plaintiff has taken the position that the services rendered by Benton were so directly and vitally related to the interstate operations of its customers as to be a part of those operations. Conversely, the defendant has taken the position that Benton's services were merely an isolated

local activity. This presents a clear fact issue at to the nature of the services which Benton rendered.

Affidavits, depositions and answers to interrogatories on file show that over 80 percent of Benton's revenues were from customers conducting interstate business activities. [Aff. 116] Among these customers were major aerospace concerns (i.e. TRW, Inc., Jet Propulsion Laboratory, Rockwell International, Teledyne, Inc.), oil companies (i.e. Mobil Oil, Union Oil, Texaco, Inc.), national builders and operators of large offices buildings (i.e. Tishman), major food processors (i.e. Carnation Company) and major communications companies (i.e. General Telephone, Pacific Telephone). There is no dispute that all of these companies and many of Benton's other customers are substantially engaged in interstate commerce and are significant factors in the total national economy. [Aff. 112-114]

To discover the nature of the services which Benton rendered to its large interstate customers, the Government obtained 12 affidavits from responsible officials of Benton's 11 largest customers (affidavits were obtained from two Rockwell officials). These officials functioned at the operating levels of their respective companies and were responsible for the procurement of Benton's services; they worked closely with Benton officials in designing effective and efficient service routines that would support the interstate business activities of these customers; they were fully cognizant of the interrelationship between Benton's services and the overall functioning of their companies. Moreover, they were officials of companies with no interest in the outcome of this litigation and there can be no question as to their credibility and lack of bias.

The affidavits submitted by officials of Benton's customers described with particularity the services which Benton rendered and the part which Benton played in their total interstate operations. These affidavits show Benton's direct and vital relationship to the operations of its customers. In the words of one official: "The services provided by Benton were an essential part of the integrated operations of the Laboratory. As such, Benton played an essential part in support of the Jet Propulsion Laboratory's role in the United States' exploration of space." [Aff. 11]

Other affidavits were to the same effect, as is clear from the following examples: "Benton Maintenance Company, in supplying these services, is a part of our interstate and

international business carried out at our Century City Headquarters office, just as is any component or unit in the Teledyne, Inc. operations." [Aff. 46]; "The janitorial maintenance services supplied by Benton were an essential service to General Telephone because cleanliness is required in these switchrooms which have millions of electrical contacts. General Telephone depended upon the expertise of Benton as a janitorial maintenance contractor to remove from these rooms the dust and dirt which could cause misconnections and wrong numbers and could even prevent calls from being completed at all." [Aff. 29]; "Union Oil Company depended upon this special expertise and capability of J. E. Benton Management Corp. and considered that firm to be an integral part of the business carried on at our international headquarters." [Aff. 38]

Thus, the affidavits from major customers of Benton are strong evidence that Benton was engaged in interstate commerce by virtue of the direct and vital services rendered to its customers and close participation with those customers in their interstate activities.

Defendant attempts to counter this evidence through the nine affidavits which we have described above. Viewed separately or as a group, these affidavits are conclusional, vague and to a large extent self-serving. Moreover, they fail to meet the full thrust of the evidence presented by the Government. In our view, the record before the Court conclusively establishes that Benton was engaged in interstate commerce by virtue of the services which they rendered. Viewed in a light most favorable to the defendant, the affidavits which defendant has presented, at best, raise fact issues to be resolved at trial.

B. *Genuine Issues Have Been Raised as to Whether Benton was Engaged in Interstate Commerce by Virtue of Its Purchases of Goods in Commerce.*

It is well settled that firms which purchase substantial quantities of goods moving in interstate commerce are "engaged in commerce." Moreover, courts have consistently held that temporary breaks in the movement of goods in commerce do not disturb the practical continuity of the flow of such goods to their intended user. Whether a particular product is moving in interstate commerce is, of course, a

fact issue to be determined on the basis of evidence from the market place.

To determine the practical relationship of Benton's purchases to interstate commerce, the Government obtained affidavits from 11 of Benton's largest supplies from whom, in one year alone, Benton purchased over $230,000 of goods which were moving in interstate commerce. [Aff. 115] Representatives of these 11 companies gave clearly competent testimony as to the practical continuity of the movement of these goods from the out-of-state manufacturer to Benton. These affidavits demonstrate that any halt in the movement of Benton's purchases was merely a convenient step in moving the goods from out-of-state to Benton. In fact, the temporary storage by local merchants was often performed as a convenience for Benton. In the words of one of Benton's suppliers:

> National warehoused these products on a temporary basis to serve as a convenient step in the movement of these goods from the manufacturer to the customer. In purchasing these goods, National intended that they would be sold and distributed to customers such as Benton. As such, these goods moved continuously in commerce until they were purchased by Benton and used in the buildings maintained by Benton. We delivered these products directly to Benton's job locations. As such, Benton was not required to stock, warehouse or deliver large quantities of these goods to their job locations." [Aff. 72]

Similar statements appear in the affidavits of other Benton suppliers: "[I]t was our expectation that such items would move through our warehouse in a continuous flow to its ultimate destination—i.e. to Benton" [Aff. 70]; "Preferred Distributing Company maintained an open account for Benton and regularly purchased lighting equipment in anticipation of Benton's demand. In fact there were occasions on which we made special purchases in order to supply Benton its needs. Preferred warehoused the lighting equipment on a temporary basis as a convenient step in the flow of these goods from the manufacturer to the ultimate consumer." [Aff. 78] To the same effect was the affidavit of one of Benton's competitors: "We could buy this equipment directly from these [interstate] suppliers, but we utilize janitorial maintenance supply jobbers as a delivery arm of our business to secure this equipment and

transport it to our job sites where it is used as part of the janitorial maintenance services which we offer." [Aff 83]

Thus, the affidavits show that Benton received substantial quantities of goods from out-of-state suppliers and that such goods moved in a continuing flow to Benton. Moreover, each of Benton's suppliers of janitorial supplies stated that it anticipated Benton's demands and intended that its purchases would move directly to Benton. [Aff. 69-73, 75-78] Such evidence establishes that the interstate shipment of these goods was earmarked for movement to Benton and remained in the continuous flow of commerce until received by Benton.

Defendant has attempted to meet this showing with inconclusive, self-serving and incompetent affidavits. Such affidavits in no way meet the affidavits of unbiased businessmen who have no personal interest in this litigation. At best, they raised fact issues to be resolved in a trial on the merits.

C. *Genuine Issues Have Been Raised as to Whether Benton Engaged in Interstate Communications as Part of Its Business.*

Interstate transactions engaged in by Benton included business communications by telephone, interstate mails, telegraph and national newspaper to and from Benton and its out-of-state customers, potential customers, suppliers and other business relations. [Aff. 118-134] These communications included the solicitation of the janitorial maintenance business of New York Life Insurance Company, New York, New York; AMPROP, Inc., Miami, Florida; Conductron Corporation, St. Charles, Missouri; and Federal Electric Corporation, Paramus, New Jersey. By virtue of its utilization of such communications, Benton obtained new customers and retained the business of existing customers. The out-of-state customers which Benton obtained and retained by such communications accounted for at least three-quarters of $1 million in annual janitorial maintenance revenues, representing ten percent of Benton's said business revenues. Prominent among these out-of-state customers with whom Benton corresponded was Tishman Realty and Construction Co., Inc., New York, New York.

Moreover, Benton's use of interstate communications was a continuing and on-going part of its business. Benton's

list of correspondence shows for the year prior to its acquisition, an average of three to four out-of-state communications every week to and from customers and other persons located throughout the United States.

These communications were a significant part of Benton's overall interstate activities which (as shown above) included the providing of essential services directly and vitally related to interstate businesses of its customers and the making of purchases in commerce for the benefit of its customers.

Defendant has submitted affidavits which purport to counter the Government's evidence on Benton's use of interstate communications to further its business. However, in our view of affidavits of defendant are entitled to little weight. Nor do they disprove the character or extent of Benton's interstate communications. Defendant has also attempted to focus attention on the postage and amounts paid for these communications to distract attention from the significance of the substantial volume of Benton's business which was dependent, in whole or in part, upon these communications. Clearly the record before the Court establishes that under the applicable test of practicality these communications were a significant and integral part of Benton's business.

At most, the defendant has raised fact issues as to the nature and significance of Benton's interstate communications. Such issue must be resolved in a trial on the merits.

D. *Genuine Issues Have Been Raised as to Whether Benton's Services, Purchase of Supplies and Use of Interstate Facilities Considered Together Establish That Benton Was Engaged in Interstate Commerce.*

The fact issues discussed above relate to Benton's engagement in commerce through the services which it rendered, its purchase of supplies and through its use of interstate communications, each considered separately. This is because the Government takes the position that each of these activities standing alone establishes engagement in interstate commerce. However, these activities when considered together also constitute engagement in interstate commerce.

Thus, in addition to the separate fact issues which are discussed above there is a larger fact issue encompassing all those separate issues, considered as a single issue.

III. Additional Genuine Issues Have Been Raised

In addition to basic fact issues discussed above, the record before the Court establishes a maze of interrelated fact issues, which separately and in combination are material to the outcome of this motion and should be decided as part of the full evidentiary trial on the merits.

We discuss some of these issues below.

A. *Genuine Issues Have Been Raised as to Whether Janitorial Maintenance Firms Provide a Distinct Group of Services.*

Affidavits from Benton's customers and competitors establish that Benton and other janitorial maintenance contractors supply "specialized knowledge, capabilities and expertise" [Aff. 10]; that their customers purchase "a distinct group of services, the most important of which is the management skill of the janitorial contractor" [Aff. 8]; that the "expertise in designing work routines is a valued expertise of the janitorial maintenance contractor" [Aff. 10]; that janitorial maintenance contractors "have teams of experienced personnel with expertise and capacity for the supervision, follow-up and back-up" [Aff. 38]; and that their "expertise" included "expert knowledge of what cleaning and maintenance materials to use and how to apply them." [Aff. 40]

Defendant has submitted affidavits designed to counter the evidence submitted by the Government and support the defendant's position that Benton merely provided unskilled labor. These affidavits merely raise fact issues to be resolved at trial on the merits.

B. *Genuine Issues Have Been Raised as to Whether Benton Played a Part in the Operations of Its Interstate Business Customers by Designing and Performing Janitorial Maintenance Work to Assist and Coordinate With the Operation of the Customers' Businesses.*

The affidavits of Benton's customers and competitors filed by the Government establish that it was characteristic of Benton's business as a janitorial maintenance contractor to work closely with its customers and coordinate the performance of its maintenance work so as to facilitate and not disrupt the operations of its customers' interstate businesses. This is stated in the words of one of Benton's competitors, as follows:

> [W]e contractors must work closely with [national business] customers in making sure that the cleaning schedules, methods, materials and equipment we use facilitate the flow of their activities. For example, the computers used by these customers are often operated around-the-clock and our maintenance personnel have to coordinate their work with the operations of the computer operators, and vice versa. Also, we have worked with these customers in choosing power cleaning equipment that did not generate electrical fields that would erase the electronic memory banks of this equipment. As another example, Bekins has cleaned the same two buildings at the Jet Propulsion Laboratory which Benton has serviced and which produced scientific devices to be used in the United States' exploration of Mars and man-to-the-moon programs. These buildings had to be specially cleaned in joint cooperation with those involved in the production activities there to make sure that no dust or dirt was present to get into this equipment and disrupt the success of this nation's space program." [Aff. 82-83]

Other affidavits are to the same effect. Benton's customer General Telephone, for example, has stated:

> We also relied upon personnel of Benton working in conjunction with our own personnel to devise schedules and procedures which would accomplish [the removal of dust and dirt from switchrooms] in such a way as to permit us to continue our communications functions. [Aff. 29]

Defendant has attempted to contradict the facts concerning the close working relationship which Benton had with its customers in coordinating mantenance activities as part of the customers' production work. Defendant relies principally on the self-serving affidavit of an ABMI employee based largely on speculation as to the relationship between Benton and its customers. For example, this affidavit ignores the fact that unbiased witnesses in a position to know attest that TRW and Benton worked in coordination with one another in making janitorial work assignments so

as to support, and not interfere with, TRW's production schedules. [Aff. 2-3] Thus, defendant's affidavits cannot refute the showing made in the affidavits submitted by Benton's customers. They can, at best, only raise fact issues.

C. *Genuine Issues Have Been Raised as to Whether Benton's Services in Support of the Electronic Data Processing Equipment of Its Customers was an Important and Vital Part of the Efficient Operation of This Equipment.*

The affidavits establish that several of Benton's customers utilized computers and other sophisticated electronic equipment as an integral and necessary part of their interstate businesses. These customers state that the janitorial maintenance services which Benton performed in and around the areas where this equipment was operated were necessary to the continued and effective working of this equipment. [Aff. 34, 40, 43-44; see also Aff. 15, 82] For example, Benton's customer Mobil states:

> The mechanical operation of electronic data processing equipment is dependent upon the janitorial maintenance and the environmental support facilities of the rooms in which the equipment is located. In 1969 and 1970, Benton employees serviced the filters of the air conditioning equipment for these rooms, improper servicing of which could have caused the computer equipment to malfunction thereby seriously interrupting the operations of Mobil's Western Region. [Aff. 34]

In response, defendant has filed one affidavit which states that "virtually" nothing short of physical abuse or carelessness would adversely affect the operations of a computer, assuming it received good technical preventative maintenance. Although defendant does not question the facts as to the importance of Benton's services to the operation of the many different types of equipment used in the data processing of its customers, it at least raises fact issues as to the part played by Benton in the operations of computers.

D. *Genuine Issues Have Been Raised as to Whether Benton Maintained and Operated Heating, Lighting, Air Conditioning and Other Equipment Necessary to the Conduct of Business Carried on Within Its Customers' Buildings.*

The affidavits from Benton's customers, Mobil, Texaco and Union, state that Benton was responsible for the maintenance and operation of the air conditioning, heating, electrical and other systems in these customers' buildings. To this end, Benton supplied and supervised the services of operating engineers who maintained and operated this equipment. Mobil, Texaco and Union conducted extensive interstate operations from their buildings and, without heat, light and air, of course, little if any of this business could have been carried on by these Benton customers. [Aff. 35, 38, 39-40]

The defendant denies the facts stated above and has filed an affidavit which states that Benton's operating engineers were supervised by Mobil, Texaco and Union, respectively, and that these customers controlled the hiring and firing of the engineers. However, Benton's contract with Union and Texaco which were filed as part of defendant's affidavits state that Benton was "solely responsible for the employment, control and direction" of the operating engineers employed by Benton in Union's headquarters building, and that Texaco was not to have any "right, power or authority in the selection, hiring, control, supervision or discharge of any of Benton's services, employees or representatives or other personnel used by Benton." [Exhibits to Affidavit of James J. Breen, pp. 7, 31-32.]

At most, therefore, Benton's affidavits may raise fact issues as to this aspect of the importance of Benton's services to the conduct of the interstate business activities of its customers in which Benton played a part.

E. *Genuine Issues Have Been Raised as to Whether Benton Provided Janitorial Maintenance Materials and Other Supplies to Its Customers as Part of Its Service.*

Plaintiff has submitted affidavits from former Benton customers and from its competitors which show that janitorial maintenance contractors provide maintenance ma-

terials, equipment and supplies as part of the service they render to customers. By hiring Benton to select and purchase these items as part of its janitorial maintenance contracting service, the customers of Benton obtained its expert knowledge as a contractor in knowing which were the best materials to be used for the particular job of the customer. [Aff. 9, 24, 26, 34, 38, 39, 40, 42, 46, 79, 80, 87, 92] Other affidavits (discussed above) establish that these purchases by Benton were of goods originating out-of-state, thus showing that Benton served as a conduit of these items to its customers.

Defendant attempts to controvert the facts above by stating in its affidavits that the Bentons sold no commodity and that there was no tangible property involved in its janitorial maintenance contracting business except insignificant, incidental facilities. These inconclusive statements of defendant at least raise a fact issue.

F. *Genuine Issues Have Been Raised as to Whether ABMI's Acquisition of Benton Was Part of a Nationwide Program of Acquisition of Competitors Which Contributed to a Local and National Trend Toward Concentration.*

Plaintiff has introduced evidence that ABMI has engaged in a conscious nationwide program of acquisition of competitors including the acquisition of Benton. This evidence further shows that by this acquisition ABMI acquired its second largest competitor in a significant section of the country.

Defendant, of course, denies this and introduces some evidence in support of its denial. However, these affidavits hardly help defendant. Indeed, they list 38 acquisitions and set out several other companies which were "contributed" to ABMI. The mechanism of acquisition is, of course, unimportant in analyzing the impact on concentration of the consolidation of two or more businesses.

Viewed against the background of the Government's affidavits we do not believe that defendant in any way contradicts the fact that ABMI is the largest janitorial maintenance contractor in the Los Angeles and Orange County area with more than twice the sales of the next largest firm, nor that it is the third largest janitorial maintenance contractor in the United States. Defendant appears to deny the

accuracy of the Government's contention that by acquiring Benton ABMI increased its market share in the relevant area from approximately 10 percent to 17 percent, yet it offers no evidence in rebuttal. At best defendant has raised fact issues.

IV. Conclusion

Experience with summary proceedings in antitrust litigation has been very unsatisfactory, and the Supreme Court has warned that summary proceedings "should be used sparingly." *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 473 (1962). Also see *White Motor Co.* v. *United States*, 372 U.S. 253, 263-64 (1963); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The record in this case demonstrates the wisdom of the Supreme Court's warning. Defendant's motion has become a veritable Pandora's Box which has unleashed a staggering array of tangled fact issues. Moreover, the fact issues raised by the conflicting affidavits must turn, in the final analysis, upon an evaluation of the credibility and the weight to be accorded each affiant. As was clearly stated in the *Poller* case, *supra*, 473:

> It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

It is also significant that the broad range of overlapping fact issues raised by the defendant's motion go to the heart of the controversy on the merits of this suit. For example, issues as to the character of services supplied by Benton as part of the interstate commerce of its customers are intertwined with the issue on the merits when the "line of commerce" or product market is determined at trial. In such situations the courts have not found summary judgment proceedings appropriate. "The summary judgment procedure is not designed to eliminate a trial of contested issues going to the heart of the controversy." *United States* v. *Columbia Pictures Corporation*, 169 F. Supp. 888, 895 (S.D.N.Y. 1959).

Moreover, defendant has fallen far short of its burden to establish an absence of fact issues and, for this reason alone, its motion must fail. As a result of defendant's motion, plaintiff's closing wave of discovery has been stayed

and four months of pretrial preparation has been lost. Expeditious resolution of the issues presented by this case can best be served by a denial of defendant's motion and immediate resumption of pretrial preparation.

For the reasons stated and because of the proliferation of genuine issues of material facts which defendant's motion has raised, it is respectfully requested that defendant's motion be denied.

DATED: December 3, 1973

Respectfully submitted,

/s/ Michael J. Dennis
MICHAEL J. DENNIS
Attorney, Antitrust Division
U. S. Department of Justice

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Caption Omitted in Printing)

DEFENDANT'S REPLY TO PLAINTIFF'S STATEMENT OF GENUINE ISSUES

Plaintiff's recently filed Statement of Genuine Issues misconstrues the nature of defendant's dismissal motion. It assumes that the motion constitutes the usual motion made pursuant to Rule 56 F.R.C.P. for summary judgment on the merits.

To the contrary, defendant's motion raises the basic foundational question of the jurisdiction of the Court over the subject matter of the action. It constitutes a suggestion for dismissal for lack of jurisdiction pursuant to Rule 12(h)(3) F.R.C.P. as well as a Rule 56 motion. Accordingly, the burden is upon the plaintiff to plead and prove by preponderance of the evidence facts establishing jurisdiction, not simply to raise the possibility that such facts exist.

Plaintiff admits on the opening page of its Reply Memorandum that jurisdiction herein depends on finding the acquired corporations "engaged also in commerce." Further, Rule 8(a) F.R.C.P. requires:

> "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." This has always been the rule. As Chief Justice Hughes said in *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178 (1936):
>
> "They [the jurisdictional prerequisites] are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." (298 U.S. at 189)

Yet the complaint nowhere alleges that the Benton companies were, prior to acquisition, "engaged also in commerce." For this reason alone the Court should dismiss.

But even if the plaintiff had sufficiently alleged juris-

diction in its complaint, dismissal would be compelled by plaintiff's failure to meet its burden of establishing grounds for jurisdiction by a preponderance of the evidence. The requirement that plaintiff sustain the burden of showing jurisdiction is stated in *McNutt* v. *General Motors Acceptance Corporation,* 298 U.S. 178, 189 (1936):

> "If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence." (298 U.S. at 189)

In *Gibbs* v. *Buck*, 307 U.S. 60, (1939) the court said:

> "The burden of showing by the *admitted facts* that the federal court has jurisdiction rests upon the complainants." (307 U.S. at 72; Emphasis added.)

The recent case of *Tanzymore* v. *Bethlehem Steel Corporation,* 457 F.2d 1320 (3rd Cir. 1972), explained the requirement in affirming a dismissal pursuant to Rule 12(h)(3):

> "Nor does he [the plaintiff] dispute that where a jurisdictional fact is traversed the burden of showing that the federal court has jurisdiction rests upon the plaintiff. . . . Nevertheless, he contends, it was improper to resolve the disputed domicile issue against him without giving him the opportunity to testify in an evidentiary hearing.
>
> "Appellant's argument confuses the court's role in deciding a motion for summary judgment under Fed.R. Civ.P. 56 with its role in making a jurisdictional determination pursuant to 28 U.S.C. § 1359 [relating to the situation where parties are collusively joined] and Fed. R.Civ.P. 12(h)(3). . . .
>
> "The plaintiff had the burden of alleging a basis for federal jurisdiction. Fed.R.Civ.P. 8(a)(1). When the jurisdictional allegations were traversed he had the burden of supporting those allegations. . . ." (457 F.2d at 1321-1324)

Plaintiff, like the appellant in *Tanzymore,* confuses its obligation to show jurisdiction by a preponderance of evi-

dence with the distinctly different standards applicable to a motion for summary judgment on the merits. Thus it merely insists, in its recently filed statement, that "genuine issues have been raised as to whether Benton was engaged in commerce."

Further, the Government's statement of issues fails to raise material issues of fact. The language in its affidavits set out in the statement is wholly conclusory. The statement quotes the opinions of the affiants that Benton performed services "vital" to the operation of its customers;[1] that goods moved in "flow of commerce"[2] and were "moving continuously in commerce";[3] and were purchased for the "anticipated needs of customers."[4]

But legal characterizations and conclusions are not evidence. It is well settled that legal conclusions in affidavits do not even give rise to genuine issues of material fact for purposes of Rule 56, F.R.C.P.

Thus, in *Beckman* v. *Walter Kidde & Company,* 316 F.Supp. 1321, 1325 (E.D.N.Y., 1970), affirmed *per curiam,* 451 F.2d 593 (2 Cir. 1971), *cert. den.* 408 U.S. 922, the Court stated:

> "A party cannot raise an issue of fact simply by relying upon the complaint or an affidavit setting forth only a bald conclusion that is flatly denied." (316 F.Supp. at 1325)

Further, in *G. D. Searle & Co.* v. *Charles Pfizer & Co.,* 231 F.2d 316, (7 Cir. 1956), the principle was reaffirmed as follows:

> "The statements above quoted made in the affidavits of the defendant's Director of Sales and Promotion constitute defendant's showing as to likelihood of confusion between the products Bonamine and Dramamine. Such showing constitutes merely expressions of affiant's opinion and his legal conclusion.

---

[1] Page 4, line 23; page 14, line 3; page 17, line 16, page 24, line 8; page 25, line 32; page 35, line 15; page 43, line 13; Affidavits in Support of Government's Memorandum in Opposition to Defendant's Summary Judgment Motion, hereafter, "government affidavits."

[2] Page 55, line 17; page 78, line 5, government affidavits.

[3] Page 2, line 23; page 4, line 24; page 48, line 5; page 63, line 3; page 70, line 5; page 72, line 26, page 73, line 1, government affidavits.

[4] Page 63, line 1; page 69, line 31; page 72, line 20; page 78, line 1.

"Under Rule 56(e), such expressions are totally ineffectual, and are not to be given any consideration or weight whatsoever." (231 F.2d at 318)

Manifestly, Government affiants' legal conclusions cannot be weighed in determining whether plaintiff has met its burden of proving jurisdiction by a preponderance of the evidence.

Plaintiff's affidavits not only fail to prove jurisdiction by a preponderance of evidence, but, when stripped of their overlay of conclusion, they fail as well to show the existence of genuine issues of material fact precluding summary judgment. Accordingly, plaintiff's Statement of Genuine Issues advances no basis for denial of defendant's dismissal motion.

DATED: December 7, 1973.

LAWLER, FELIX & HALL
MARCUS MATTSON
ANTHONIE M. VOOGD
BRUCE R. CORBETT

By Anthonie M. Voogd

Attorneys for Defendant American Building Maintenance Industries

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 71-55
UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

SUMMARY JUDGMENT OF DISMISSAL IN FAVOR OF DEFENDANT AMERICAN BUILDING MAINTENANCE INDUSTRIES AGAINST PLAINTIFF UNITED STATES OF AMERICA

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, the Court made its Findings of Fact and Conclusions of Law, and it appearing that there is no genuine issue as to any material fact and that said defendant is entitled to a judgment of dismissal as a matter of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment of dismissal be entered in favor of defendant American Building Maintenance Company against plaintiff United States of America dismissing the above entitled action, and that said plaintiff take nothing on his complaint from defendant, and that said defendant have and recover its costs from said plaintiff in the sum of $_____.

Dated at Los Angeles, California this 12 day of December, 1973.

JESSE W. CURTIS,
United States District Judge.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 71-55

UNITED STATES OF AMERICA, PLAINTIFF
v.
AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

NOTICE OF ENTRY

To the above named parties and to their attorneys of record:

You are hereby notified that *Summary judgment of dismissal in favor of defendant American Building Maintenance Industries against plaintiff United States of America* in the above entitled case was entered in the docket on *December 12, 1973.*

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (*After* sixty days in cases in which the United States, its officers or agencies were parties). Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on December 12, 1973, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

EDWARD M. KRITZMAN,
Clerk.

By JOE R. FLORES,
Deputy Clerk.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 71-55

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES OF AMERICA, PLAINTIFF
v.
AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, and it appearing that there is no genuine issue as to the facts hereinafter set forth, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Defendant American Building Maintenance Industries is, and at all times relevant to this action was, a corporation organized under the laws of the State of California, having its principal office in San Francisco, California.

2. J. E. Benton Management Corporation, formerly named Pacific Realty Securities Company, was at all times relevant to this action a corporation organized under the laws of the State of California having its only office in Los Angeles, California.

3. On June 30, 1970 all of the stock of J. E. Benton Management Corporation was acquired by defendant.

4. Prior to June 30, 1970 and at all times relevant to this action, J. E. Benton Management Corporation engaged in the real estate business and the business of providing building management, janitorial and related services. These were the only businesses engaged in by J. E. Benton Management Corporation and they were conducted entirely

within Los Angeles, Orange and Ventura Counties in California.

5. J. E. Benton Management Corporation had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how, and no location or business situs advantage.

6. Between March 1, 1970 and June 30, 1970 J. E. Benton Management Corporation made no purchases of products which were shipped to it from outside California.

7. Between March 1, 1969 and February 28, 1970 J. E. Benton Management Corporation made no purchases of any product or services of any kind or character which were shipped to it from outside California except the following:

(a) Real estate publications costing $13.39 from Matthew Bender Company, Albany, New York;

(b) Reel rack costing $25.01 from Monarch Metal Products, New Windsor, New York;

(c) Income tax publication costing $79.98 from Prentice Hall, Inc., Englewood Cliffs, New Jersey; and

(d) Sign purchase costing $11.97 from Ready Made Sign Company, Long Island, New York.

These purchases do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

8. J. E. Benton Management Corporation did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

9. Benton Maintenance Company, formerly named S. W. Straus & Co. and Affiliated Maintenance Company, was at all times relevant to this action a corporation organized under the laws of the State of California, having its only office in Los Angeles, California.

10. On June 30, 1970 Benton Maintenance Company was merged into American Building Maintenance Company of California, a subsidiary corporation of defendant.

11. At all times relevant to this action Benton Maintenance Company was engaged in the business of providing janitorial and related services. This was the only business engaged in by Benton Maintenance Company and it was conducted entirely within Los Angeles, Orange and Ventura Counties in California.

12. Benton Maintenance Company had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how and no location or business situs advantage.

13. Between January 1, 1969 and June 30, 1970 Benton Maintenance Company made no purchases of products which were shipped to it from outside California.

14. Benton Maintenance Company did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

15. J. E. Benton Management Corporation and Benton Maintenance Company received telephone services from The Pacific Telephone and Telegraph Company ("Pacific") over telephone number 737-3220 through a single switchboard at their offices located at 3727 West Olympic Boulevard, Los Angeles, California. From January 1969 through June 1970 Pacific billed J. E. Benton Management Corpora- $18,310.70 for these services. Pacific was paid $18,260.45 on these bills of which $19.78 represented payment of charges for ten out-of-state calls apparently related to the business activities of the Benton corporations. These ten calls do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

16. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.

17. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with its suppliers. There are no significant economies to be realized through bulk or quantity purchases of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial service. The basic service provided was the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of total amounts paid by customers for janitorial services.

18. The major suppliers of the Benton corporations were:

(a) Ball Industries, El Segundo, California, which delivered industrial and janitorial equipment and supplies from its warehouse to the Benton corporations' warehouse at 3727 West Olympic Boulevard or to customer locations specified by the Benton corporations;

(b) National Sanitary Supply Co., Los Angeles, California, which delivered paper goods and other janitorial supplies from its warehouse to the Benton corporations' warehouse or to customer locations specified by the Benton corporations;

(c) U. S. Guards, Monterey Park, California, which provided the Benton corporations with building guard services on a subcontract basis; and

(d) Courtesy Chevrolet Leasing, Los Angeles, California, which leased vehicles to the Benton corporations.

19. Plaintiff United States of America does not allege in its complaint herein that the Benton corporations, or either of them, are engaged in commerce, nor does plaintiff allege that the effect of the acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in areas other than areas wholly within California.

20. The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found to be true in all respects and are to that extent adopted by the Court as Findings of Fact.

Based upon the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

21. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

22. J. E. Benton Management Corporation was not a corporation engaged in commerce at the time of the acquisition of its stock by defendant.

23. Benton Maintenance Company was not a corporation engaged in commerce at the time of its merger into American Building Maintenance Company of California, a subsidiary corporation of defendant.

24. There is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act. (15 U.S.C. § 18.)

25. Plaintiff United States of America is not entitled to a judgment or a final decree or damages against defendant.

26. Defendant is entitled to a summary judgment in its favor dismissing this action and judgment of dismissal should be entered accordingly.

27. The foregoing Findings of Fact, insofar as they or any of them may be considered Conclusions of Law, are to that extent hereby adopted by the Court as Conclusions of Law.

Dated at Los Angeles, California, this 12 day of December, 1973.

JESSE W. CURTIS,

United States District Judge.

SUPREME COURT OF THE UNITED STATES

No. 73-1689

UNITED STATES, APPELLANT,

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 13, 1975

Mr. Justice Douglas took no part in the consideration or decision of this matter.

☆ U.S. Government Printing Office: 1975—569-006/112

Supreme Court, U. S.
FILED
JUL 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Appellee moves the Court to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifest that there are no material disputed questions of fact and the questions of law as to which review is sought are, on their face, without substantial merit.

The Question Restated.

May a corporation engaged in rendering janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state, be deemed "engaged also in commerce" within that clause of Section 7 of the Clayton Act?

Statutes Involved.

Involved here is the phrase "engaged also in commerce" as it appears and is defined in the following

sections of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, as amended):

Section 7 (15 U.S.C. §18):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *"[1]

Section 1 (15 U.S.C. §12):

> " 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *"

Statement.

On January 8, 1971 this action was filed to assert the illegality of the June 30, 1970 acquisition by American Building Maintenance Industries ("ABMI") of J. E. Benton Management Corporation and Benton Maintenance Company ("Benton corporations"). The sole contention was that the acquisition violated Section 7 of the Clayton Act. Notwithstanding the explicit limitation in Section 7 that the acquired corporation must be "engaged also in commerce" before Section 7 can apply, the complaint failed to allege that the acquired corporations were so engaged. It is conceded that the acquired corporations operated only within the State of California.

Since the acquiring corporation (appellee ABMI) operates in a number of states, it is not controverted

[1]Emphasis added herein unless otherwise noted.

that ABMI is "engaged in commerce." There is accordingly no issue relative to ABMI's activity, and the comments on that activity in the Jurisdictional Statement are plainly irrelevant.[2]

The court below on motion for summary judgment found that the acquired corporations were not "engaged also in commerce" and that accordingly the District Court lacked jurisdiction under Section 7 of the Clayton Act.[3] The Government makes no contention that there was any procedural impropriety in the presentation or the consideration of the motion for summary judgment or that the findings of fact are in any way erroneous. The Government disputes only the conclusions of law drawn from the findings of fact.

The findings of fact show:

1. Both Benton corporations (the acquired corporations) were engaged in the business of providing janitorial and related services. One of them, J. E. Benton Management Corporation ("Benton Management"), also engaged in the real estate and building management businesses. The Benton corporations conducted their businesses entirely within Los Angeles, Orange and Ventura Counties in California.[4]

2. The Benton corporations had no manufacturing plants, no sales or distribution outlets, no products

[2]Appellee disputes the accuracy and completeness of the Government's characterization of the acquiring company in the Jurisdictional Statement. That characterization constitutes a thinly disguised effort to argue matters not properly germane.

[3]Findings 22 through 24 of the District Court's Findings of Fact and Conclusions of Law attached as Appendix A to the Jurisdictional Statement, hereinafter "Findings".

[4]Findings, 4 and 11.

which were sold or shipped, no patents or scientific know-how, and no location or business situs advantage.[5]

3. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.[6]

4. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with suppliers. There are no significant economies to be realized through bulk or quantity purchase of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial services. The basic service provided is the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of the total amounts paid by customers for janitorial services.[7]

5. The Benton corporations purchased their supplies from suppliers in California. During the sixteen-month period prior to the acquisitions Benton Maintenance Company purchased no products which were shipped to it from outside of California and Benton Management purchased $130.35 of such products, a *de minimis* amount.[8]

6. The Benton corporations did not advertise nationally. During the eighteen-month period prior to the

[5]Findings, 5 and 12.
[6]Findings, 16.
[7]Findings, 17.
[8]Findings, 6, 7, 13 and 18.

acquisitions, these corporations' total expenses for out-of-state telephone calls related to business activities were $19.78, a *de minimis* amount.[9]

Janitorial service contractors are merely labor brokers who provide the local unskilled labor necessary to clean buildings. Equipment requirements are minimal: mops, pails, sweepers, cleansers and the like. It is difficult to conceive of an industry where entry is easier. The industry is therefore characterized by a high level of competition. Contracts with building owners are generally terminable by the owner upon thirty days' notice. Janitorial service contractors compete on the basis of price and quality of service. Such contractors face the competition of not only other contractors but also of building owners who provide their own janitorial services in-house.[10]

The Question Presented Is Not Substantial.

The Jurisdictional Statement contends that Congress, in enacting Section 7 of the Clayton Act, exercised the utmost extent of its constitutional power to regulate matters affecting commerce as it did in enacting the Sherman Act, and, accordingly, the Benton corporations were "engaged in commerce" because:

(a) They purchased in California supplies originating in other states;

(b) Certain of their customers sold products in interstate and foreign commerce; and

[9]Findings, 8, 14 and 15.

[10]See generally *Urban Business Profile, Building Service Contracting*, United States Department of Commerce, EDA-72-59582, 1972, referred to in the Affidavit of Phillip Neff.

(c) They solicited and negotiated contracts with certain customers through interstate communications.

These contentions do not give rise to a substantial question warranting review by this Court because:

(1) It is absolutely clear from the language of Section 7 and the authorities construing that section that Congress did not therein fully exercise its constitutional power over commerce;

(2) A corporation cannot be deemed in commerce merely because its customers and suppliers may be so engaged; and

(3) Assuming, *arguendo,* that Congress exercised in Section 7 the same broad control over matters affecting commerce that it exercised in the Sherman Act, the facts relied upon by the Government are wholly insufficient to establish jurisdiction.

A. In Section 7 of the Clayton Act Congress Used Only a Limited Part of Its Constitutional Power to Regulate Commerce.

Section 7 of the Clayton Act was enacted in 1914, and was amended to its present form in 1950. Both its original enactment and its amendment came years after the enactment of Sherman Act Sections 1 and 2. In the course of the 1950 amendment to Section 7 of the Clayton Act, Congress considered at length all of the deficiencies that were claimed to have existed in Section 7 as originally enacted. The 1950 amendment, however, made no change in the jurisdictional requirement that the acquired corporation must be "engaged also in commerce." Section 7 was in 1950 broadened to allow attacks upon acquisitions made by

means of the transfer of assets rather than those merely accomplished by the acquisition of stock. Notwithstanding over fifty years experience under the Sherman Act and thirty-six years experience under the Clayton Act, the restrictive jurisdictional requirement that both the acquiring and the acquired corporation must be "engaged in commerce" has remained unchanged since its original enactment in 1914.[11]

Accordingly, the intent of Congress is clear. Congress did not in the Clayton Act, or in its amendments thereto, adopt the jurisdictional test of the Sherman Act which calls only for an effect upon commerce, but instead in the Clayton Act retained and reaffirmed the jurisdictional test which requires that both the acquiring corporation and the acquired corporation be "engaged in commerce." In the Sherman Act, Congress exercised the utmost extent of its constitutional power to establish jurisdiction over restraints and monopolies.[12] In Section 7 of the Clayton Act, by contrast, Congress acted only to authorize attacks upon mergers and acquisitions where both parties to the mergers or acquisitions were "engaged in commerce."

Under the Sherman Act, with its exercise of the constitutional power to the ultimate, a defendant's conduct may either *occur in or affect* commerce. This dichotomy can be illustrated by reference to *Rasmussen v. American Dairy Association,* 472 F.2d 517 (9th Cir. 1973), where the court stated:

"The jurisdictional question [under the Sherman Act] . . . concerns Congress' power to reach

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[11]See discussion of the legislative history in *Brown Shoe Co. v. United States,* 370 U.S. 294, 311-323 (1962).

[12]*United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558 (1944).

the defendant's conduct: '[T]he restraint must occur in or affect commerce between the states . . . *for constitutional reasons.*'" (472 F.2d 522, citing *Klor's Inc. v. Broadway-Hale Stores,* 255 F. 2d 214, 224 (9th Cir. 1958), *reversed on other grounds,* 359 U.S. 207 (1959), emphasis in original).

The two tests of jurisdiction under the Sherman Act are defined in *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732 (9th Cir. 1954), *cert. den.* 348 U.S. 817 (1954), as follows:

"(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.

"(2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but, substantially *affected* interstate commerce [the 'effect on commerce' theory]." (210 F.2d 739, n. 3, emphasis in original).

Of these two theories, Congress adopted only the "in commerce" test in enacting Section 7 of the Clayton Act. This is clear from the use of the words "engaged in commerce" in Section 7, as follows:

"No corporation *engaged in commerce* shall acquire * * * the stock * * * of another corporation *engaged also in commerce,* where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18).

Further, "commerce" is defined in Section 1 of the Clayton Act as meaning "trade or commerce among the several States and with foreign nations," the movement of goods and services between states and foreign nations.

Thus, in the clearest possible language, Section 7 requires that *both* the acquiring and acquired corporations be engaged in interstate commerce. This requirement is conceded by the Government and is uniformly recognized. *Ekco Prods. Co.,* CCH Trade Reg. Rep. ¶16,879 at 21,901 (FTC 1964), *aff'd* 347 F.2d 745 (7th Cir. 1965); *Golden Grain Macaroni Company v. F.T.C.,* 472 F.2d 882, 887 (9th Cir. 1972). This dual requirement that both corporations be engaged in commerce negates any possibility of concluding that Congress intended to exercise its full constitutional powers over commerce in Section 7.

The words "engaged in commerce" appear elsewhere in the Clayton Act and are uniformly interpreted as adopting the "in commerce" test of jurisdiction. Section 2(a) of the Clayton Act[13] was thus construed in *Myers v. Shell Oil Company,* 96 F.Supp. 670, 675 (S.D. Cal. 1951) as follows:

"In enacting the Sherman Act, Congress intended to exercise all the power it possessed over interstate commerce. Congress has the power to regulate intrastate activities which affect interstate

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[13]Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U.S.C. §13(a)) provides in pertinent part:

"(a) It shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * *."

commerce or trade, if the regulation of intrastate activities is necessary and approprate [sic] to protect the free flow of interstate commerce. In short, any intrastate activity is subject to the regulatory power of Congress if it *affects* interstate commerce in any way in a substantial manner, and Congress in enacting the Sherman Act intended it to apply to such activity or conduct.

"Section 2(a, c, d, f), 15 U.S.C.A. § 13 (a, c, d, f), and Section 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13a, contain, however, the specific language that it shall be unlawful for any person '*engaged in commerce*' to do any of the prescribed acts '*in the course of such commerce*'. Thus, in enacting the provisions of the Clayton and Robinson-Patman Acts here under consideration, Congress did not exercise all of its power over commerce, but dealt only with persons engaged *in commerce* and with restraints *in the course of commerce*." (Emphasis in original.)

Also in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972), the court stated "failure of any party to have any interstate business disposes of the Clayton Act and Robinson-Patman Act claims." It is for this reason that the courts have held that at least one of the discriminatory sales must cross a state line to fulfill the statutory requirement of Section 2(a) that the sales be "in commerce." *Littlejohn v. Shell Oil Company*, 483 F.2d 1140, 1144 (5th Cir. *en banc* 1973), *cert. den.* 414 U.S. 1116 (1973); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178 (10th Cir. 1972), *cert. den.* 408 U.S. 928 (1972).

The jurisdictional phrase "engaged in commerce" or "in commerce" appears in other legislation and has uniformly been recognized by the Court as ineffective to establish an "effect on commerce" test of jurisdiction.

In *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207 (1959), the Court was called upon to determine whether certain non-professional employees were "engaged in commerce", as that phrase was used in Section 6 of the Fair Labor Standards Act.[14] The Court, per Chief Justice Warren, stated:

> "We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce,' indicated its intent not to make the scope of the Act coextensive with its power to regulate commerce." (358 U.S. at 211).

In *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349 (1941) the Court interpreted the words "in commerce" as they appear in Section 5(a) of the Federal Trade Commission Act,[15] and concluded, per Mr. Justice Frankfurter:

> "This case presents the narrow question of what Congress did, not what it could do. And we mere-

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[14]Prior to its amendment in 1966, Section 6 of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. §206), provided:

> "(a) Every employer shall pay to each of his employees who is *engaged in commerce* or in the production of goods for commerce wages at the following rates: * * *"

[15]Section 5(a) of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 719, as amended, 15 U.S.C. §45) provides in pertinent part that:

> "Unfair methods of competition *in commerce*, and unfair or deceptive acts or practices *in commerce*, are hereby declared unlawful."

ly hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all of the relevant considerations, much clearer manifestation of intention than Congress has furnished." (312 U.S. 355).

There is no reason to believe that Congress intended the phrase "engaged in commerce" to have a broader meaning in 1914 when it enacted the Clayton Act or in 1950 when it amended the Act than the meaning intended for the phrase in 1938 when it enacted the Fair Labor Standards Act. Further, those words manifest no different or broader Congressional intent than the words "in commerce" used in the Federal Trade Commission Act.

Accordingly, it is manifest from the language of the statute that Congress did not fully exercise its constitutional power to regulate matters affecting commerce in enacting Section 7 of the Clayton Act.

The Appellant's Jurisdictional Statement advances three equally untenable arguments in support of its contention that jurisdiction under Section 7 can be established by showing the acts complained of affected commerce.

First, the Government refers to the Section 7 language which prohibits acquisitions "where in any line of commerce in any section of the country, the effect of the acquisition may be substantially to lessen competition, or tend to create a monopoly" and argues that this language gives the Court jurisdiction if the "effect of the acquisition" is to lessen competition substantially or tend to create a monopoly in a line of commerce.

The argument, however, ignores the fact that Section 7 is explicitly limited to acquisitions by a corporation "engaged in commerce" of the stock of another corporation "engaged also in commerce." For the Government's argument to have any validity whatever, it would be necessary to give no recognition at all to the phraseology in Section 7 making the section applicable only when there is an acquisition by a corporation engaged in commerce of the stock of another corporation engaged in commerce. Congress was remarkably explicit in defining in the jurisdictional sense those whose transactions are subject to the prohibitions of the section. Unlike other anti-trust laws, which apply without limitation to the complete spectrum of natural persons and artificial entities,[16] Section 7 is limited at the outset to corporations, another evidence that Congress did not fully exercise the utmost extent of its constitutional power over commerce. Congress not only limited the application of Section 7 to a class consisting solely of corporations, but further limited that class to corporations engaged in commerce. It is only after the parties to the acquisition are determined to be parties made subject to Section 7 that the transaction can be put to the test proscribed by the section.

Second, the Government asserts that in 1950 when Congress strengthened Section 7 to prohibit in their incipiency anticompetitive activities it must have intended to exercise the full reach of its commerce power, otherwise its attempt to deal with incipient anticompetitive practices would have been weakened. As noted above, Congress did not change in any way the jurisdic-

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[16]*Western Laundry and Linen Rental Co. v. United States,* 424 F.2d 441, 443 (1970), *cert. den.* 400 U.S. 849 (1970).

tional requirements of Section 7 when it amended that statute in 1950. It would be peculiar statutory interpretation indeed to conclude that Congress intended to expand the jurisdictional test created by the words "engaged also in commerce" by reenacting those words without change. Such statutory interpretation is exactly what the Court condemned in *Kirschbaum v. Walling*, 316 U.S. 517 (1942), per Mr. Justice Frankfurter, as follows:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." (316 U.S. 522).

Third, the Government cites *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3rd Cir. 1953) for the proposition that Section 7 represents the broadest possible exercise of Congressional power over commerce. The most that can be said of that case is that it held that banking is commerce, a fact recognized in *United States v. Philadelphia National Bank*, 374 U.S. 321, 336, n. 12 (1963). Moreover, because commercial banking is of necessity interstate it was conceded that the acquired banks were corporations engaged in commerce. Clearly, there is nothing in *Transamerica Corp.* from which it can be argued that language in

Section 7 can be disregarded that expressly makes the section applicable only when the acquired corporation is "engaged also in commerce."

B. The Purchase of Supplies Originating in Other States Is Insufficient to Establish Jurisdiction.

The Government contends that the acquired Benton corporations were engaged in commerce because they purchased supplies within California which originated outside of California. It is, of course, fundamental that goods once in commerce do not remain in commerce indefinitely. The interstate commerce in goods does terminate. *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954).

The court below reviewed the voluminous briefs and affidavits of the parties, applied the rules as to when commerce in goods ceases, and concluded that none of the supplies that originated out of California were in commerce when purchased by the Benton corporations. The Government's appeal does not question this. Instead the Government contends that the simple fact that the Benton corporations purchased goods originating out-of-state establishes jurisdiction because such purchases have been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce.

As noted above, jurisdiction under Section 7 cannot be established by a showing of an effect on commerce. However, even assuming *arguendo* that it did, the purchase by the Benton corporations in California of supplies originating out-of-state is wholly insufficient to establish jurisdiction under that test. The Sherman Act cases cited by the Government, *Burke v. Ford*, 389 U.S. 320 (1967), and *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954), do not hold that the

in-state purchase of goods originating out-of-state establishes Sherman Act jurisdiction; they hold that local restraints which do not occur in interstate commerce come within the scope of the Sherman Act if they *substantially affect interstate commerce.*

In the present case the Government failed to plead or prove any effect, let alone a substantial effect, on the interstate commerce in janitorial supplies arising from the acquisition of the Benton corporations. The complaint alleges only that the "effect of the aforesaid acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in Southern California and the Los Angeles area. . . ." The court below found, and the Government does not contest, that supplies represent a minor part of the total costs of providing janitorial services, approximately three percent of the total amounts paid by customers for janitorial services.[17]

In *United States v. Frankfort Distilleries,* 324 U.S. 293 (1945), a Sherman Act case, Mr. Justice Black noted:

> "* * * [The Supreme] Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." (324 U.S. 297).

The effect, if any, of the acquisition of the Benton corporations upon the interstate commerce in supplies was neither substantial nor direct. The local purchase of

[17]Findings, 17.

supplies by the Benton corporations raises no substantial questions warranting review under either the "effect on commerce" or "engaged in commerce" jurisdictional tests.

C. The Acquired Benton Corporations Were Not Engaged in Commerce Merely Because of the Commerce Carried on by Their Customers.

The Government's Jurisdictional Statement indicates that a corporation performing janitorial services for companies that sell products in interstate and foreign commerce is itself engaged in commerce for purposes of Section 7 of the Clayton Act. This simply is not so. The normal and spontaneous meaning of the words "another corporation engaged also in commerce" is that the corporation itself must be engaged in interstate commerce.

The Court has taught that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.,* 332 U.S. 218, 231 (1947). It is not a practical concept to consider a local janitorial service corporation is engaged in the interstate and foreign commerce in such products as petroleum, milk and spacecraft simply because the corporation cleans buildings operated by customers who sell those products in interstate and foreign commerce.

As in the case of supplies originating out of state, the Government contends that the Benton corporations were engaged in the commerce of their customers because their acquisition affected that commerce. Here also, the Government failed to plead or prove any substantial or direct effect on commerce arising from the acquisition.

D. The Acquired Benton Corporations Were Not Engaged in Commerce by Reason of Their Use of Interstate Communications.

The Government's Jurisdictional Statement further indicates that a corporation which solicits and negotiates contracts by means of interstate communications is "engaged in commerce" for purposes of Section 7 of the Clayton Act. Specifically, it is asserted that the janitorial services contract with Tishman "was executed by Tishman executives based in New York" and a New York Life Insurance contract "was the product of interstate negotiations."[18]

As to this the record shows only a *de minimis* use of interstate communications by the acquired Benton corporations. Their total expenses for out-of-state telephone calls relating to business activities during the period of eighteen months preceding the acquisition amounted to only $19.78.[19] A total of 203 interstate mail items were sent or received by those corporations, only a few of which related to the solicitation or negotiation of contracts.[20] The total expenditures during the eighteen-month period for all of those mail items would amount to only $22.33, assuming an 11¢ airmail stamp was used for each of the 203 items.

Aside from the *de minimis* nature of the acquired Benton corporations' use of interstate communications, it is clear that in any event jurisdiction cannot be based upon the mere use of interstate communications.

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[18]Jurisdictional Statement, page 6.

[19]Findings, 15.

[20]Affidavit of John D. Gaffey.

This is illustrated by *John Kalin Funeral Home, Inc. v. Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd* 442 F.2d 1342 (9th Cir. 1971), *cert. den.* 404 U.S. 881 (1971), in which the Court stated:

> "No authority has been cited or found directly or indirectly sustaining Sherman Act jurisdiction based merely upon interstate communications conducted in the regular course of an otherwise purely local business." (313 F.Supp. 438-439).

E. The Question Presented in This Case Is Not the Same as the Question Presented in Gulf Oil Corp. v. Copp Paving, Inc.

While in both this case and *Gulf Oil Corp. v. Copp Paving, Inc.*, No. 73-1012 now pending before this Court, there is an unwarranted effort to misread Section 7 of the Clayton Act, it would serve no purpose to allow this appeal in order to have the cases heard together as the Government suggests. In *Gulf Oil Corp.* the question is whether the intrastate manufacture and sale of a commodity used in the construction of an interstate highway makes the supplier a corporation "engaged also in commerce." Unlike *Gulf Oil Corp.* there is here no instrumentality of interstate commerce to which any commodity is furnished. Determination of the question in this case should not be confused by having the cases heard together. The questions involved in the two cases being different, it would not be useful or appropriate under Supreme Court Rule 43(5) for them to be argued or heard together as one case.

Conclusion.

Since federal courts have limited jurisdiction the party seeking to invoke that jurisdiction must plead and show by preponderance of the evidence facts establishing that jurisdiction. *McNutt v. General Motors,* 298 U.S. 178, 189 (1936). The court below applied the well-established jurisdictional standards of Section 7 of the Clayton Act to the facts shown by the Government and properly concluded it lacked jurisdiction. Specifically, the court held it is without jurisdiction in a case arising under Section 7 unless both the acquired corporation and the acquiring corporation were engaged in commerce. The Jurisdictional Statement raises no substantial question of law regarding those standards warranting review by this Court and points to no substantial competent evidence that the acquired corporations in this case were engaged in commerce. Accordingly, Appellee's motion to affirm should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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No. 73-1689

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

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Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1689

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

Appellee's principal legal argument that in Section 7 of the Clayton Act Congress did not fully exercise its power to regulate commerce is answered in our jurisdictional statement and our brief *amicus curiae* in *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012 (a copy of which has been served upon appellee's counsel). The Fair Labor Standards Act cases upon which appellee relies are irrelevant because in that Act Congress did not exercise its power to regulate local activities affecting commerce (see *Kirschbaum Co.* v. *Walling*, 316 U.S. 517), while in Section 7 of the Clayton Act it did.

We are filing this brief to answer appellee's contentions that the particular activities involved in this case did not significantly affect commerce.

The activities of Benton, the acquired firm, affect commerce because of Benton's purchase of goods originating in other states. Appellee's attempt to avoid this basis for applying the statute on the ground that Benton purchased through local suppliers (Motion to Affirm, pp. 15-16) is unsound. The distinction between direct and indirect purchases would be relevant only in determining "flow of commerce" jurisdiction. See *Burke* v. *Ford,* 389 U.S. 320, 321; *Rasmussen* v. *American Dairy Assoc.,* 472 F.2d 517, 526 (C.A. 9). Both direct and indirect purchases may substantially "affect" commerce. See, *e.g., Wickard* v. *Filburn,* 317 U.S. 111.

Appellee also asserts that Benton's purchases did not have a significant effect upon commerce because they represent a relatively small portion of Benton's costs (Motion to Affirm, p. 16). The effect of Benton's purchases cannot be determined on that basis, however; the proper inquiry is the substantiality of the purchases in dollar amount. Benton paid more than $150,000 per year to purchase or lease goods manufactured in other states. Such expenditures represent a substantial amount of interstate commerce. See *Katzenbach* v. *McClung,* 379 U.S. 294; cf. *Fortner Enterprises* v. *U.S. Steel,* 394 U.S. 495.[1]

The services that Benton performed for its customers also had a significant effect upon the flow of commerce. Benton's customers included several of the country's leading corporations, which had substantial interstate and international sales. The price and quality of the janitorial services those corporations purchase necessarily have an impact on their operations.

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[1]In *Katzenbach* v. *McClung* this Court upheld the application of the Civil Rights Act of 1964 to a restaurant which purchased $70,000 worth of meat per year which had originated in other states. All purchases were made through a local supplier. In *Fortner Enterprises* the Court concluded that a tying arrangement involving annual sales of $190,000 represented a substantial volume of commerce in the tied product. The Court said that "we cannot agree with respondents that a sum of almost $200,000 is paltry or 'insubstantial'." *Id.* at 502.

Finally, although Benton's janitorial services were performed locally, Benton was nevertheless engaged in interstate commerce because it conducted interstate negotiations in selling its services. Appellee claims that these interstate negotiations are not a significant factor since the cost of the interstate messages was *de minimis* (Motion to Affirm, p. 18). We submit that the significant fact is the existence of such interstate negotiations rather than their cost.

Benton was "engaged in commerce" within the meaning of Section 7 of the Clayton Act for the reasons stated herein and in the jurisdictional statement.

It is therefore respectfully submitted that the motion to affirm be denied and probable jurisdiction noted.

ROBERT H. BORK,
Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

Supplementary Brief of American Building Maintenance Industries in Support of Motion to Affirm.

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Appeal From the United States District Court for the Central District of California.

Supplementary Brief of American Building Maintenance Industries in Support of Motion to Affirm.

The late realization that its appeal required bolstering prompted the Government to file its brief *amicus* in *Gulf Oil Corp. v. Copp Paving Co.*[1] and to inject that brief into this case by means of a reference to it in its December 1974 Memorandum in Opposition to the Motion to Affirm.

This supplemental brief is filed pursuant to Rule 16(5) of this Court because appellee has been afforded no opportunity to respond to the *amicus* brief[2] and be-

[1]Decided by the Court on December 17, 1974, 43 U.S. Law Week. 4059.

[2]The motion of appellee American Building Maintenance Industries for leave to file an amicus brief in *Gulf Oil Corp. v. Copp Paving Co.* was denied by the Court in October of 1974.

cause the Government in its *amicus* brief seeks to raise a question not presented on this appeal.

The sole question presented by the Government's Jurisdictional Statement was:

> "*Whether a corporation which performs janitorial and maintenance services within a single state* for companies which sell products in interstate and foreign commerce, which solicits and negotiates such contracts through interstate communications, and which purchases substantial quantities of supplies originating in other states, *is 'engaged in commerce' for purposes of Section 7 of the Clayton Act.*"[3]

The Government's belated and illogical argument presented by its December 1974 Memorandum is that since "commerce" defined in Section 1 of the Clayton Act and the "trade or commerce among the several States" referred to in the Sherman Act are the same, the words, "engaged also in commerce" and the prohibition of "restraint of trade or commerce" in the Sherman Act must have the same meaning. In other words, the Government would have this Court say that *if* a corporation could be successfully prosecuted after it engaged in price fixing or some other violation of the Sherman Act which affected interstate commerce it must be deemed to be "engaged also in commerce" within Section 7 of the Clayton Act.

The argument embodies an obvious *non sequitur*. Any corporation, no matter how local or how remote its normal operations are from interstate commerce and no matter how clear its non-engagement "in commerce" has been, could be prosecuted under the Sherman Act if it combined and conspired with another to violate the Sherman Act if it were shown that the combination and conspiracy had a detrimental effect on interstate commerce. But that possibility alone cannot mean that such a local corporation is "engaged also in commerce" as that clause is used in Section 7 of the Clayton Act.

[3]Jurisdictional Statement, page 2, emphasis added herein unless otherwise noted.

Our inquiry here is whether the Benton companies were "engaged also in commerce" prior to the acquisition—not whether they were corporations subject to prosecution under the Sherman Act. No one has even intimated that the Benton companies have violated, or otherwise become subject to the Sherman Act, or for that matter any other anitrust statute. They cannot be deemed to have done anything which adversely "affected" interstate commerce within the ambit of the Sherman Act, absent proof that they violated that Act. Since the Benton companies have not become subject to the Sherman Act the Government cannot say that they are within the terms of the Clayton Act because they could have been subject to the Sherman Act *if* they had combined and conspired to detrimentally affect interstate commerce.

Accordingly, it avails the Government nothing to transpose the Clayton Act words "engaged also in commerce" into the Sherman Act concept "engaged in detrimentally affecting interstate commerce" because the Benton companies cannot be brought within either.

Even under the Sherman Act principles, it is only acts and practices which have substantial adverse effects on interstate commerce which are within that statute. *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S.

....., 43 U.S. Law Week. 4059, 4064 (1974), citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-234 (1947). This fundamental requirement is expressed in each of the Sherman Act cases relied upon by the Government in its December 1974 Memorandum.[4] If jurisdiction under the Sherman Act is to be founded upon an effect upon interstate commerce, the challenged restraint must have detrimental economic effect on that commerce. There is no suggestion here that the activities of the Benton companies had any such adverse effect.

A foundation of the Government's argument is its erroneous statement in its *amicus* brief that in enacting the Clayton Act "Congress intended to exercise the full extent of its constitutional power to regulate commerce."[5] The fact is that Section 7 of the Clayton Act is one of the narrowest of the antitrust laws.

Both as enacted in 1914 and as reenacted in 1950, Congress applied the prohibitions of Section 7 to corporations only. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent or effect of his acquisitions, is, or has been, subject to its prohibitions.

When initially enacted in 1914, Section 7 did not purport to "exercise the full extent" of Congressional power since it applied only to the acquisition of stock. No acquisition of assets, no matter how large, and regardless of the extent or the effect of the acquisition, was then subject to its prohibitions. In 1950, when the

[4]*Burke v. Ford*, 389 U.S. 320, 321 (1967); *Fortner Enterprises v. U.S. Steel*, 394 U.S. 495, 501 (1969), and *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522 (9th Cir. 1973).

[5]Brief for the United States as Amicus Curiae, page 8.

prohibitions of Section 7 were extended to cover the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover in the enactment of Section 7 in 1914, and its reenactment in 1950, Congress explicitly provided that it applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." Regardless of how broadly one construes the words "in commerce," it remains explicit that both parties to the acquistion must be engaged in commerce. No matter how extensive the operations of one party to the transaction, it is clear that Section 7 cannot apply unless both parties to the transaction were so "engaged."

Under the Government's premise here, Congress had the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

Moreover, Congress did not do so either in 1914 or in 1950 notwithstanding the fact that at both times it had before it, as a model if it intended to utilize its full power, the all inclusive provisions of the Sherman Act, which in Section 1 was explicitly made to cover "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."[6] And in Section 2 it was explicitly made to cover "*Every* person who shall monopolize, or attempt to monopolize . . . *any* part of the trade or commerce among the several States . . ."[7] The election of Congress not to follow the all inclusive kind of language found in the earlier

[6]Sherman Act, §1 (15 U.S.C. §1).

[7]Sherman Act, §2 (15 U.S.C. §2).

Sherman Act demonstrates that Congress did not in Section 7 of the Clayton Act exercise, or intend to exercise, "the full extent of its constitutional power to regulate commerce." Accordingly, cases defining the scope of the Sherman Act, which the Government cites, are not helpful to any determination of the scope of Section 7 of the Clayton Act.

The Government's argument disregards the fact that Section 7 has not one but three prerequisites to its application:

> *First*, the acquiring corporation must be "engaged in commerce";
>
> *Second*, the acquired corporation must be "engaged also in commerce"; and
>
> *Third*, the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

By contrast, Sections 1 and 2 of the Sherman Act have only the single standard of application, *viz.*, the anti-competitive effect of the defendant's conduct. The Government would have this Court disregard the fact that in Section 7 Congress, separately and apart from its definition of the parties made subject to its prohibition, defined the action by those parties which was prohibited. Not all acquisitions of corporations engaged in commerce violate Section 7. No one has contemplated that any but a small percentage of corporate acquisitions would be subject to Section 7. For instance, there were 3,158 mergers recorded in 1972 and 2,826 mergers recorded in 1973,[8] only a few of which were challenged by the Department of Justice or the Federal Trade Commission. It is only acquisitions by corpo-

[8]Federal Trade Commission News Release of November 1, 1974.

rations engaged in commerce of corporations engaged in commerce, the effect of which acquisitions "may be substantially to lessen competition, or to tend to create a monopoly," that violate Section 7.

The Court below held that the acquired Benton companies were not engaged in commerce finding that they "conducted their businesses entirely within Los Angeles, Orange and Ventura Counties in California" and that the business of providing janitorial services is an "intensely local activity."[9]

The Government does not contest these findings. Rather it asserts that the activities of the Benton companies "affect commerce because of Benton's purchase of goods originating in other states" and the services performed for its customers "had a significant effect upon the flow of commerce."[10] But these purported effects would not give rise to jurisdiction even under the broad language and principles of the Sherman Act because the Benton companies had not caused any *adverse* effect on interstate commerce. Benton's purchase of goods which had passed in interstate commerce and the providing of requested services to customers could not have a detrimental effect on such commerce.

It is difficult, if not impossible, to conceive of any business which could have less of an engagement in commerce than the business of the Benton companies.

[9]Findings 1, 4, 11, 16, 22 and 23 of the District Court's Findings of Fact and Conclusions of Law attached as Appendix A to the Jurisdictional Statement, hereinafter "Findings."

[10]Memorandum for the United States in Opposition to Motion to Affirm, page 2.

Theirs was the business of supplying local labor to local buildings. Incidental to their business was their purchase of mops, pails, soaps, etc., which were purchased without regard to their point of origin from local vendors. None of these purchases were made by ordering the goods from vendors situated out of the State.[11] The Benton companies did not advertise nationally; they did not enter into any requirements or continuing supply contracts with any supplier.[12]

In its December 1974 Memorandum, the Government asserts three propositions.

First, it is said that "the activities of Benton . . . affect commerce because of Benton's purchase of goods originating in other states." Notwithstanding the fact that these purchases were made from local suppliers, the Government calls these purchases as made "through" local suppliers, and seeks to denominate them "indirect" purchases, and it is suggested that "indirect purchases may substantially 'affect' commerce." The fact is that the purchases of the Benton companies were entirely completed within the state. They were not made from someone else "through" a local supplier, and they were not "indirect" but were purchases in which only the local purchaser and the local supplier were involved. While it is stated that these purchases "affect commerce," there is not the slightest intimation as to how. Under the Government's theory, it is equally true that any purchase by the Benton companies, or a failure to

[11]The only exceptions were real estate publications costing $13.39, a reel rack costing $25.01, an income tax publication costing $79.98 and a sign costing $11.97. All of these out-of-state purchases were properly found by the trial court to be *de minimus*. Findings 7 and 13.

[12]Findings 8, 14 and 17.

purchase by the Benton companies, could "affect commerce." A purchase of locally manufactured goods in preference to out-of-state manufactured goods would result in less out-of-state transportation into the state, and thus "affect commerce." As we have seen above, if the engagement of the Benton companies in commerce is to be judged by the "effect" of their purchases on commerce, it must by every antitrust principle be a detrimental effect on commerce arising from some illegal act of the Benton companies, which has not been claimed. The Benton companies cannot be judged to be "engaged also in commerce" by merely purchasing from local suppliers.

Second, it is asserted that the janitorial services that the Benton companies performed for its customers had a "significant effect upon the flow of commerce." This is nothing more than an effort to say that the Benton companies were "engaged also in commerce" because some of their customers engaged in interstate business. If that proposition could be sustained, it would mean that virtually everyone was "engaged in commerce" no matter how local their activities. Here again, the Government does not describe the detrimental effect which the janitorial services of the Benton companies had upon the flow of commerce. It is asserted that the Benton companies were engaged in commerce because the "price and quality" of their janitorial services had an "impact" upon their customers' operations. In other words, the Government is saying that the question as to whether janitors are engaged in commerce, within Section 7, depends on whether they are good (or bad) janitors and whether their prices are too high (or low). That ambiguous concept cannot be an appropriate standard for judging the question presented here.

Third, it is said that the mere existence of incidental "interstate negotiations" in the sale of janitorial services were significant regardless of their cost (meaning regardless of their extent).[13] Since the record is silent upon the content of the interstate communications on which the Government relies, it is unable even to assert that they had any effect upon interstate commerce. Regardless of their content, and even under the Sherman Act, it is clear that jurisdiction cannot be sustained on the basis of interstate communications conducted in the regular course of an otherwise purely local business. *John Kalin Funeral Home, Inc. v. Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd.* 442 F.2d 1342 (9th Cir. 1971) *cert. den.* 404 U.S. 881 (1971).

The Government makes no contention that there was any impropriety in the presentation or the consideration of the motion for summary judgment. The Government was given a full opportunity to present the facts and it has never contended to the contrary.

It has been accepted as fact that the Benton business was an intensely local activity. It consisted of supplying local unskilled labor to clean local buildings. There is an uncommon ease of entry into the business, and it is therefore one wherein there is a high level of competition. Customer contracts are generally terminable upon 30 days notice, a fact which contributes to the high level of competition on the basis of price and quality.

[13]The Government relied upon the existence of 201 interstate letters sent and received by the Benton companies in one year and a half prior to the acquisition, and 13 interstate telephone calls made and received by the Benton companies during the same period. There was no effort made to show what was said either in the telephone calls or the letters. While the interstate letters were produced to the Government, they were never made a part of the record.

Janitors, moreover, are subject to the competition of their customers who may and frequently do provide their own janitorial services in-house.

The appeal presented by the Government is not substantial and appellee's motion to affirm should be granted.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and conclusions of the district court (App. 211–215) are unreported.

JURISDICTION

The judgment of the district court (App. 209) was entered on December 12, 1973. A notice of appeal to this Court was filed on February 7, 1974, and probable jurisdiction was noted (App. 216) on January 13, 1975. The jurisdiction of this court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526.

QUESTION PRESENTED

Whether a corporation that performs janitorial and maintenance services within a single state for companies selling products in interstate and foreign commerce, that solicits and negotiates such contracts through interstate communications, and that purchases substantial quantities of supplies originating in other states, is "engaged in commerce" for purposes of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, provides in pertinent part:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

Section 7 of the Clayton Act, 389 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The United States instituted this civil antitrust suit against American Building Maintenance Industries (American Building) on January 8, 1971, contending that American Building violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by acquiring the stock of J. E. Benton Management Corp. and by merging Benton Maintenance Company into American Building Maintenance Company of California, a wholly owned subsidiary of American Building. The complaint alleged that the merger and acquisition, which were consummated in 1970, may substantially lessen competition in the sale of janitorial services in Southern California and the Los Angeles area. (App. 8)[1] On December 12, 1973, the district court granted the defendant's motion for summary judgment, holding that neither of the Benton companies was "engaged in commerce" within the meaning of Section 7 of the Clayton Act at the time of the merger and acquisition (App. 214).

[1] The complaint defines "Southern California" as Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino and Riverside Counties (App. 6).

A. THE ACQUIRING COMPANY AND THE INDUSTRY

American Building Maintenance Company of California is a wholly owned subsidiary of American Building. The complaint alleged that American Building is the largest seller of janitorial services in Southern California and one of the largest sellers of such services in the country. At the time the complaint was filed, American Building had 56 janitorial service branches serving 500 communities in the United States and Canada. American Building's national revenues from janitorial services were approximately $52.4 million in 1969. In Southern California, American Building's janitorial service revenues for 1969 were $10.9 million—roughly 10 percent of the market (App. 7).

Service industries are the fastest growing segment of the American economy. More than half of the nation's work force is employed in those industries and soon more than half of this country's Gross National Product will be generated in the service sector. The supplying of janitorial services by independent contractors is one of the fastest growing service businesses. Receipts for such services increased by 324 percent from 1958 to 1967. In 1972, national receipts for commercial, institutional and industrial cleaning services were more than $1 billion (App. 129–133, 137).

There is a nationwide trend toward concentration in the janitorial service industry. The four largest firms made at least 170 acquisitions of janitorial service and related businesses between 1961 and 1973.

American Building made 54 of those acquisitions, which included five janitorial service companies in the Los Angeles area in addition to the Benton companies (App. 140–143).

American Building has publicly acknowledged that it intends to accelerate this acquisition program. In a December 1971 speech to institutional investors, the president of American Building stated: "We have been buying four—six companies a year. I would say in the future it would be fair to estimate that we will buy between six and eight companies a year" (App. 142).

B. THE ACQUIRED COMPANIES

Jess E. Benton, Jr. owned all of the stock of J. E. Benton Management Corp. and 85 percent of the stock of Benton Maintenance Company at the time of the merger and acquisition (App. 49, 139). Both companies sold janitorial services; Benton Management also provided building management services and engaged in the real estate business. All of the facilities served by these companies were located in Southern California. The complaint alleged that the Benton Companies ("Benton") was the fourth largest seller of janitorial services in Southern California, with 1969 sales of over $7.2 million. This represented about 7 percent of the total janitorial service sales in that area (App. 7).

C. BENTON'S OPERATIONS

Benton provided janitorial services necessary to support the interstate operations of its customers (App. 133–137). These customers included TRW,

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Inc., NASA Jet Propulsion Laboratory, Rockwell International Corp., General Telephone Co., of California, Pacific Telephone and Telegraph Co., Mobile Oil Corp., Union Oil Co., Texaco, Inc., Carnation Co., Teledyne, Inc., and Tishman Realty & Construction Co. (App. 52).

For its aerospace customers, Benton maintained and cleaned offices, manufacturing areas and laboratories. Certain areas required exceptionally high maintenance quality—*e.g.*, "clean rooms" utilized for spacecraft fabrication and assembly, and rooms housing electronic data processing equipment. In these areas, janitorial maintenance was an integral part of production operations.[2]

Benton maintained and cleaned offices and rooms containing switching equipment for its telephone company clients, corporate headquarters buildings for Union Oil, Carnation and Teledyne, and regional headquarters buildings for Mobil and Texaco. Benton performed all the janitorial services for the owner and tenants at Tishman Plaza, a large office complex in the Los Angeles area.[3]

In some cases Benton's activities were confined to cleaning services. It assumed responsibility, in other cases, for maintaining heating, air conditioning, electrical and plumbing facilities (App. 71–90). Benton paid utility bills for Texaco (App. 84).

Although all of Benton's maintenance contracts were performed in California, some of the contracts

[2] App. 54–70. Cf. App. 179–181.

[3] App. 71–90.

were negotiated with out-of-state owners through the use of interstate communications facilities. The Tishman Plaza contract was executed by Tishman executives based in New York (App. 72), and the New York Life Insurance contract was the product of interstate negotiations (App. 147–160). Those two contracts made a significant contribution to Benton's total revenues.[4]

Benton regularly utilized interstate communications in its business. Between January 1, 1969, and June 30, 1970, Benton was shown to have mailed almost 200 letters across state lines to customers, potential customers, suppliers, government agencies, etc. It also utilized interstate telephone and telegraph facilities (App. 146–161).

Benton purchased substantial quantities of janitorial supplies and other goods manufactured outside of California. In 1969 Benton purchased more than $120,000 in janitorial supplies which were manufactured outside California,[5] and paid about $36,000 in lease fees attributable to vehicles and a computer which were manufactured in other states (App. 145).[6]

[4] The details of these transactions are contained in exhibits covered by the district court's protective order of June 2, 1971.

[5] The district court findings focused only on Benton's direct interstate purchases which were admittedly small. The court found direct purchases aggregating approximately $140 and interstate telephone calls of $19.78 (Finding 7, App. 212; Finding 15, App. 213). The findings do not reflect Benton's purchases of out-of-state products from local distributors, which, as noted in the text, were substantial.

[6] Benton also expended about $80,000 in funds advanced by clients for gas, water, electricity and elevator parts which originated outside of California (App. 145, 184–185).

D. THE SUMMARY JUDGMENT PROCEEDINGS

American Building filed a motion for summary judgment together with proposed findings of fact and conclusions of law. After receiving memoranda, affidavits and counter-affidavits from both parties and hearing oral argument, the district judge adopted, with minor modifications, the findings and conclusions submitted by American Building. The court did not expand its findings to reflect evidentiary material submitted after American Building prepared its original proposed findings.[7]

The court found that the Benton companies conducted their businesses entirely within California, and that Benton did not advertise nationally. Benton's purchases of products "which were shipped to it from outside California" and its expenditures for interstate telephone calls, the court concluded, were *de minimus* (App. 212.). The court held that each Benton company "was not a corporation engaged in commerce" and that "[t]here is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act (15 U.S.C. § 18)" (App. 214).

[7] American Building submitted its proposed findings on August 28, 1973 in conjunction with the filing of its motion for summary judgment of dismissal (App. 4). The government submitted extensive evidentiary material in the form of affidavits of customers, suppliers, competitors and experts on October 15, 1973 (App. 4). The district court adopted, almost verbatim, American Building's proposed findings (App. 211–215). Since those findings do not reflect the material contained in the affidavits submitted by the government concerning the Benton companies' activities—the accuracy of which is not seriously disputed—the court's findings are clearly deficient.

SUMMARY OF ARGUMENT

The question presented by this case is whether the words "engaged in commerce" as used in Section 7 of the Clayton Act encompass firms engaged in intrastate activities that substantially affect commerce. This question was presented but not resolved in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.* No. 73–1012, decided December 17, 1974. We adhere to the view set forth in our brief *amicus curiae* in *Gulf Oil, supra,* that "engaged in commerce" for purposes of Section 7 means all commerce subject to federal jurisdiction under the commerce power.

1. A broad construction of the commerce requirement of Section 7 is consistent with the history and purpose of the Clayton Act. That Act was a remedial statute designed to correct deficiencies in the Sherman Act. The Sherman Act has been construed to cover local activities that substantially affect interstate commerce (*United States* v. *South-Eastern Underwriters Assn.,* 322 U.S. 533), and it would be anomalous to interpret the Clayton Act—a statute intended to supplement the Sherman Act—more restrictively.

2. The language and legislative history of the Clayton Act necessitate a broad construction of Section 7's commerce requirement. See pp. 18–23, *infra.* The definition of "commerce" contained in Section 1 of the Clayton Act and its accompanying legislative history show that Congress intended to claim broader commerce coverage than that provided in the Sher-

man Act. Although the Congressional debates on the Clayton bill do not reveal a consensus concerning the precise scope of the commerce power, the debates do show that a majority did not believe that federal jurisdiction was limited to activities in the "flow of commerce". That view was supported by contemporaneous judicial decisions. Equally importantly, the legislative history confirms that Congress intended to claim the full sweep of its power to regulate commerce.

3. This Court's decisions regarding the commerce requirements of the Robinson-Patman Act (*Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* slip op. at 6–12) and the Federal Trade Commission Act (*Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349) are not controlling here.

The terms of Section 2(a) of the Robinson-Patman Act are more restrictive than the language of Section 7 and the courts have consistently construed Section 2(a) to require a sale crossing a state line. Moreover, in enacting the Robinson-Patman Act, Congress expressly rejected proposed language that would have provided broader commerce coverage. This Court's decision in *Bunte Bros.*, construing the Federal Trade Commission Act, is based on factors which are not relevant to Section 7 and in part upon the unfounded assumption that Congress always includes words such as "affecting commerce" when it wishes to regulate intrastate commerce which affects interstate commerce. Congress did not follow that style

of draftsmanship in 1914. It had no reason to do so because the contemporaneous judicial decisions defined "commerce among the States" to include all commerce except commerce which is confined within one state *and* does not affect other states.

4. Thus, the language, history and purpose of the statute demonstrate that "engaged in commerce" means engaged in activities subject to the Commerce Power. Activities which affect the flow of commerce are subject to the Commerce Power and Benton engaged in such activities. It purchased and leased substantial quantities of goods which originated outside California. Such purchases have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. Benton also affected commerce by providing essential services to several of the country's leading interstate enterprises. Therefore, the Benton companies were "engaged in commerce" for purposes of Section 7.

Even if "engaged in commerce" were equated with being in the "flow of commerce", Benton's activities satisfy that test. Benton provided services to numerous clients engaged in interstate and foreign commerce and those services were essential to its clients' interstate operations. Indeed, those interstate enterprises "contracted out" essential operations to Benton.

ARGUMENT

I. SECTION 7 APPLIES TO FIRMS ENGAGED IN LOCAL ACTIVITIES THAT SUBSTANTIALLY AFFECT COMMERCE

A. INTRODUCTION

The district court erred in concluding that the Benton companies were not "engaged in commerce" at the time of their respective merger with, and acquisition by, American Building. Although the court did not fully explain its understanding of the words "engaged in commerce", it adopted a restrictive construction that is contrary to both the history and purpose of Section 7 of the Clayton Act.

This Court has never determined the meaning of "engaged in commerce" for purposes of Section 7. This question was presented in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, No. 73-1012, decided December 17, 1974, and while it was discussed in the Court's opinion (see slip op. 14–17), the Court ultimately determined that it need not resolve the issue since the record contained "no evidence of effect on interstate commerce" (*id.* at 16). Thus, Mr. Justice Powell's opinion for the Court concluded, "* * * the 'effects on commerce' theory, even if legally correct, must fail for want of proof" (*id.* at 16–17).

The record in this case establishes that the Benton companies were engaged in activities that "affect" interstate commerce. See pp. 36–44, *infra*. The question of the proper construction of "engaged in commerce" for purposes of Section 7 of the Clayton Act—which this Court did not resolve in *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra*—is therefore presented here.

We adhere to our submission presented in our brief *amicus curiae* in *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* that in enacting the Clayton Act, Congress sought to claim the full sweep of its power to regulate commerce. Accordingly, the commerce requirement of the Clayton Act should be construed, like that of the Sherman Act (*United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533), to reach all activities that affect interstate commerce.

In *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* this Court commented that the "in commerce" language of Sections 3 and 7 of the Clayton Act and Section 2(a) of the Robinson-Patman Act "appears to denote only persons or activities within the flow of interstate commece * * *" (slip op. 8). But we submit that it should not be assumed that the words "in commerce" have a uniform meaning that can be applied without regard to the historical and linguistic context in which they have been used.

Words normally do not have a single plain meaning that can be applied in every circumstance, and this is particularly true in the case of words such as "commerce," "in commerce," "interstate commerce," etc. Such words have been used in different statutes at different times to describe different combinations of activities and transactions. They may not even have precisely the same meaning in different provisions of the same statute. See *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 433–434.

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In *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, this Court observed (*id.* at 520–521):

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

As we shall now show, our submission regarding the proper construction of the words "engaged in commerce" in Section 7 of the Clayton Act is consistent with both the history and purpose of the statute.

B. THE HISTORY AND PURPOSE OF THE CLAYTON ACT NECESSITATE A BROAD CONSTRUCTION OF SECTION 7'S COMMERCE REQUIREMENT

As the official title of the Clayton Act ("An Act To supplement existing laws against unlawful restraints and monopolies * * *," 38 Stat. 730) implies, Congress intended to extend the proscription of the anti-trust laws to transactions and trade practices not covered by the Sherman Act. The Senate Report declared that the objective of the Act was (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1):

> * * * to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus,

> by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation * * *.

See, *e.g., Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, 355–356; *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318 n. 32.

Section 7 was enacted in response to the great merger movement which began at the end of the nineteenth century. See H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. Decisions by this Court in *Standard Oil Co.* v. *United States,* 221 U.S. 1, and *United States* v. *American Tobacco Co.,* 221 U.S. 106, were perceived widely, if incorrectly, as emasculating the Sherman Act. See Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law,* 3 Va. L. Rev. 411, 414–415 (1916). Section 7 of the Clayton Act was designed to supplement the Sherman Act and arrest the creation of trusts or monopolies in their incipiency.

The House Committee Report states that Section 8 of the House Bill, which became Section 7 of the Clayton Act, was intended to eliminate the evil resulting from the aggregation of economic power through stock acquisitions "so far as it is possible to do so." H. Rep. No. 627, 63d Cong., 2d Sess., p. 17.

This Court discussed the purposes of Section 7 as it read prior to the 1950 amendments in *United States* v. *E. I. DuPont De Nemours & Co.,* 353 U.S. 586, and observed (353 U.S. at 589):

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of com-

> petition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.

The Clayton Act was a remedial statute designed to reach anticompetitive practices in their incipiency. It would have been anomalous for Congress to have sought to strengthen the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have restricted the jurisdictional scope of those remedial provisions. The Court of Appeals for the Third Circuit recognized this fact, in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, certiorari denied, 346 U.S. 901, in holding that banking constituted "commerce" for purposes of the Clayton Act. Thus, the court stated (206 F. 2d at 166):

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since

> the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

This conclusion is further supported by the 1950 amendments to the Clayton Act, which extended Section 7 to cover the acquisition of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that history reflects a continuing Congressional intent fully to exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Acquisition of firms engaged in local activities may violate Section 7 if the effect of their acquisition may be substantially to lessen competition in relevant geographic and product markets. For example, a firm

such as American Building could obtain a virtual monopoly of a service industry, with significant interstate consequences, by acquiring one local firm after another across the country. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. [H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8.]

C. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE CLAYTON ACT ARE CONSISTENT WITH A BROAD CONSTRUCTION OF SECTION 7'S COMMERCE REQUIREMENT

The applicable provisions of the Clayton Act must be read in light of the legislative purpose discussed at pp. 14–18, *supra*. As we have shown, the Clayton Act was a remedial statute and it would be anomalous to hold that its jurisdictional scope is more restricted than the Sherman Act which it was designed to supplement. The language and legislative history of the Clayton Act are consistent with that conclusion.

1. Section 7 of the Clayton Act prohibits mergers or acquisitions which may have anticompetitive effects where both the acquired and acquiring firms are

"engaged in commerce". The meaning of the phrase "engaged in commerce" is primarily derived from the definition of "commerce" in the Clayton Act and its legislative history.

Section 1 of the Clayton Act defines "commerce" as follows:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

This definition, which appeared in the original bill reported by the House Judiciary Committee in 1914,[8] used almost the precise words—"trade or commerce among the several States and with foreign nations"—which had been used in the Sherman Act.[9] It also

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[8] The Senate added a proviso, "That nothing in this Act contained shall apply to the Philippine Islands." S. Rep. No. 698, 63d Cong., 2d Sess., pp. 42–43. The definition section as amended has remained intact as 15 U.S.C. 12.

[9] Section 1 of the Sherman Act, 15 U.S.C. 1, declares that every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and Section 2, 15 U.S.C. 2, declares that persons who monopolize "any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

broadened the definition to encompass commerce between insular possessions and territories. The legislative history of the Clayton Act confirms that by this broad definition of "commerce" Congress intended that the Clayton Act would reach all commerce to which the Sherman Act was applicable. See pp. 30–31, *infra*.

Indeed, the House Committee Report reveals that the authors of the Clayton Act believed that they had provided broader commerce coverage than that provided in the Sherman Act. This Report says (H. Rep. No. 627, 63d Cong., 2d Sess., p. 7):

> The definition of commerce, it will be observed, is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts.

Since Congress wanted to describe all the commerce covered by the Sherman Act, plus some that might not be, the word "commerce" should be interpreted in accordance with that stated purpose. The word "commerce" in every Clayton Act provision should be read to include all commerce covered by the Sherman Act unless the language or history of a particular Clayton Act provision demonstrates that the word was used to describe something else.

2. This Court has concluded that the commerce coverage of the Sherman Act is coextensive with all commerce subject to federal regulation under the Constitution. In *Atlantic Cleaners & Dyers* v. *United States, supra*, this Court observed (286 U.S. at 435):

> A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.

In *United States* v. *South-Eastern Underwriters Assn., supra,* 322 U.S. at 558, this Court again concluded that the Congress which enacted the Sherman Act "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." The Court has accordingly interpreted the Sherman Act to give effect to that Congressional purpose. In *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 298, the Court said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495."

Consistent with this approach, the Sherman Act has been applied broadly to local activities which substantially affect interstate commerce. See *e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States v. Em-*

ploying Plasterers Assn., 347 U.S. 186 (combination to suppress competition among Chicago plastering contractors); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition). As this Court stated in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.[10]

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[10] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, did not limit the Sherman Act to purely interstate activities. In that case this Court held that while a conspiracy among taxi cab companies to control the transportation of passengers between railroad stations in Chicago was within the reach of the Sherman Act (332 U.S. at 229), transportation of passengers to and from the stations to homes, offices, and hotels had only a "casual and incidental" relationship to interstate commerce (332 U.S. at 230–232). The Court noted that a traveler has complete freedom to arrange his transportation by several means of conveyance, of which taxi cab service is only one. The Court cautioned, however, that it was not "establish[ing] any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. * * * All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation" (332 U.S. at 232–233).

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The phrase "engaged in commerce" in Section 7 should accordingly be interpreted to mean engaged in activities which are subject to the federal Commerce power. A more restrictive interpretation, confining the statute to activities within the flow of interstate commerce, would partially defeat the Clayton Act's central purpose of halting incipient anticompetitive transactions before they develop into restraints and monopolies prohibited by the Sherman Act.

D. THIS COURT'S DECISIONS CONSTRUING THE COMMERCE REQUIREMENTS OF THE ROBINSON-PATMAN ACT AND THE FEDERAL TRADE COMMISSION ACT ARE NOT CONTROLLING HERE

1. The Robinson-Patman Act

The factors which led the Court to conclude in *Copp* that Section 2(a) of the Robinson-Patman Act does not reach all discriminatory sales which are subject to the Commerce Power are not applicable to Section 7 of the Clayton Act. Although the Clayton Act commerce definition is applicable to Section 2 of the Robinson-Patman Act, which replaced the original Section 2 of the Clayton Act, the Court's decision with respect to the commerce reach of Section 2(a) was based upon language and history which is peculiar to that provision.

Section 2 of the original Clayton Act prohibited certain discriminatory commodity sales in the course of "commerce" by sellers who are "engaged in commerce." A third commerce requirement was added by

the 1936 amendments which limited the application of the revised provision to transactions "where either or any of the purchases involved in such discrimination are in commerce * * *" (49 Stat. 1526). A long series of courts of appeals' decisions interpreted that 1936 language to mean that "at least one of the two transactions which, when compared, generate a discrimination * * * cross a state line" (slip op. 13–14). This Court concluded that it is logical to interpret "purchases * * * in commerce" in that context to mean an interstate sale.

Moreover, this Court did not rely exclusively upon the language of Section 2(a) and precedent construing it. The Court also found that the 1936 Congress had considered and rejected other language which would have made Section 2(a) applicable to discriminatory sales by "any person, *whether in commerce or not*" and concluded that this Congressional action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact" (slip op. 13).

There is no comparable evidence of a conscious Congressional decision to reject arguably broader commerce language with respect to Section 7. The "engaged in commerce" language was part of the original bill proposed by the House Judiciary Committee under the leadership of Congressman Clayton. The 1914 Congress never considered adopting different language such as "corporations engaged in or affecting commerce." In 1950, Congress did not consider changing the wording of the commerce requirement when it amended Section 7."

2. The Federal Trade Commission Act

Appellee claims that this Court should conclude that the words "in commerce" necessarily mean in the flow of interstate commerce because the Court concluded in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, that the words "in commerce" in Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, mean in the flow of interstate commerce.

The *Bunte Bros.* decision was based on two grounds: (1) a restrictive principle of statutory construction derived from an examination of the commerce provisions in legislation enacted between 1935 and 1940, and (2) the Commission's own restrictive construction of the Act, reflected in its unsuccessful attempt in 1935 to obtain legislation extending the Act to local activities affecting commerce. Neither rationale may properly be applied to the Clayton Act.

A. The principle of statutory construction adopted in *Bunte Bros.* is of doubtful validity in light of this Court's subsequent decision in *South-Eastern Underwriters, supra.* The principle was based upon and reflected a method of legislative drafting which embodied contemporaneous judicial decisions re-

[11] It should be noted that the Section 7 commerce language unlike the Robinson-Patman Act third test does not have a long history of judicial interpretation. The *Transamerica* opinion is the only previous opinion which has addressed the question presented in this case.

strictively construing the reach of the commerce clause. It assumes that the Congress which wrote the Clayton Act in 1914 intended to freeze the reach of that Act "within the mold of then current judicial decisions defining the commerce power." *South-Eastern Underwriters, supra,* 322 U.S. at 557. This proposition was rejected in *South-Eastern Underwriters* with respect to the 1890 Congress which adopted the Sherman Act. It must also be rejected as applied to the 1914 Congress which passed the Clayton Act—a statute that was intended to broaden the earlier legislation.

In *Bunte Bros.,* this Court stated (312 U.S. at 351):

> When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U.S.C. §§ 152 (7), 159(c), 160(a); Bituminous Coal Act, § 4–A, 50 Stat. 83, 15 U.S.C. [1940 ed.] § 834; Federal Employers' Liability Act, § 11, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51.

But, as the dissent in *Bunte Bros.* recognized, *id.,* at 358, the three statutes cited by the majority as examples were enacted over 20 years after the Federal Trade Commission Act became law. These statutes, moreover, were enacted after *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, decided in 1935, which drew a sharp distinction between "flow of commerce" and "affecting commerce" jurisdiction.

"The meaning of each [statutory] phrase must be closely related to the time and circumstance of its use." *United States* v. *Stewart,* 311 U.S. 60, 69. Subsequent "statutes dealing with other fields * * * are of little aid in interpreting an earlier act in its own legislative setting." *Federal Trade Commission* v. *Bunte Bros., supra,* 312 U.S. at 358 (dissenting opinion).

Judicial decisions of the 1914 era do not draw a sharp distinction between activities in the flow of interstate commerce and local activities which affect that commerce. Judges of that period tended to equate "commerce among the States" with all commerce which is subject to federal regulation.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, 194, Chief Justice Marshall commented: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." The commerce "which concerns more States than one" includes all commerce within a state which affects interstate commerce.

Two years before the enactment of the Clayton Act, in the *Second Employers' Liability Cases,* 223 U.S. 1, 46–47, this Court said:

> The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

The following year, this Court observed in the *Minnesota Rate Cases*, 230 U.S. 352, 398:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The draftsmen of the Clayton Act were presumably aware of those decisions. Using the phrase "among the several States" in the Clayton Act's definition of "commerce", they must have assumed, would claim the full sweep of Congressional power to regulate commerce.

Therefore, the *Bunte Bros.* decision is erroneous to the extent that it is based on the assumption that Congress has always employed words such as "affecting commerce" when it wished to cover both activities in the flow of interstate commerce and intrastate commerce which affects the flow of interstate commerce.[12] That assumption fails to take account of the fact that styles of draftsmanship change over time.

The majority opinion in *Copp* suggests another reason for concluding that the 1914 Congress may have meant "engaged in the flow of interstate commerce" when it used the words "engaged in commerce." That opinion observed (slip op. 15): "When these sec-

[12] Congress subsequently revised Section 5 of the Federal Trade Commission Act to insert "in or affecting commerce" in lieu of "in commerce." See Section 201(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183, 2193.

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tions were originally enacted, it was thought that Congress' Commerce Clause power reached only those subjects within the flow of commerce, then defined rather narrowly by the Court."

But our discussion of the judicial opinions preceding passage of the Act and the Congressional debates concerning the Clayton bill (see pp. 27–28, *supra*; pp. 30–31, *infra*) demonstrates that neither the courts nor a majority of the members of Congress equated the Commerce Clause power with the flow of commerce. As previously noted, this Court's opinions in the *Second Employers' Liability Cases* and the *Minnesota Rate Cases* stated that Congress had power to regulate all commerce except that commerce which is confined within one state *and* does not affect other states. That definition of the Commerce Power does not exclude intrastate commerce which does affect other states.

This Court issued an opinion in the midst of the congressional debate on the Clayton Act which did focus directly upon the question of federal power to regulate local activities affecting interstate commerce. In the *Shreveport Rate Cases*, 234 U.S. 342, this Court held that the Interstate Commerce Commission may regulate intrastate railroad rates which affect interstate commerce. Although that decision did not finally determine the precise scope of congressional power to regulate intrastate commercial activities, it at least established that congressional power to regulate commerce among the several states includes power to regulate some activities which are not part of the "flow of

commerce."[13] Thus, at the time the Clayton Act was enacted, this Court did not confine Congress' Commerce Clause power to only those subjects within the "flow of commerce."

The Clayton Act debates do not reveal any consensus with respect to the precise scope of the Commerce Power. A majority of the members did not participate in this aspect of the debates. Many members did express opinions on that subject, but their views were widely divergent. See, *e.g.*, 51 Cong. Rec. 14035–14042. Some believed that Congress had no power to regulate intrastate transactions. See, *e.g.*, 51 Cong. Rec. 9411 (remarks of Rep. Towner), 51 Cong. Rec. 16115 (remarks of Sen. Walsh). Some believed that Congress did have power to regulate some intrastate sales. See, *e.g.*, 51 Cong. Rec. 9159 (remarks of Rep. Floyd). Still others described the Commerce Power in terms which are as expansive as any of the subsequent decisions of the Court. For example, Senator Reed declared (51 Cong. Rec. 14458):

> I hold to the view that the right of Congress to regulate interstate commerce carries with it the power to do all that is necessary to protect that interstate commerce and see that it flows freely and openly and without obstruction, and that therefore Congress has the power within its discretion to condemn certain acts which are in the nature of consolidations, the reasonable

[13] There is no suggestion in the *Shreveport Rate Cases* or any other decision of the time that particular statutory language was necessary to claim that power.

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> effect of which may be to restrain trade, and that if Congress exercises that power it will not, in my humble judgment, be disturbed by the court.

We submit that while it is not possible to reconstruct a majority consensus with respect to the precise limits of the Commerce Power, the legislative history does provide clear evidence that a majority of the 1914 Congress did not equate the Commerce Power with the flow of interstate commerce.

Notwithstanding the absence of a consensus concerning the precise scope of the commerce power, the choice of language in the Section 1 definition of "commerce" indicates that the 1914 Congress intended to exercise all the power it had. The draftsman did not use words such as "affecting commerce," "the flow of commerce," "interstate commerce," or "intrastate commerce." They used the words trade or "Commerce * * * among the several States * * *." These are the precise words used in Article I, Section 8, clause 3 of the Constitution to describe the scope of Congressional power to regulate domestic commerce. A draftsman who wanted to describe all commerce which is subject to federal jurisdiction would reasonably assume that using the precise words of the Constitution would accomplish that purpose.[14]

[14] The contemporaneous history of the Federal Trade Commission Act provides further evidence that the 1914 Congress equated the commerce described in Section 1 of the Clayton Act with that commerce which Congress has power to regulate. The two bills were considered at the same time. The Federal Trade Commission Act was finally enacted on September 26, 1914, and

B. The second ground underlying *Bunte Bros.*—the agency's own restrictive interpretation of the statute and its unsuccessful legislative attempt to

---

the Clayton Act was enacted on October 15, 1914. Both the House and Senate versions of the Trade Commission Bill defined "commerce" as "such commerce as Congress has the power to regulate under the Constitution." H. Rep. No. 1142, 63d Cong., 2d Sess., pp. 11, 13. The Conference Committee changed the definition to "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." *Id.* at 2–3. The Conference Report did not explain the change apart from a general observation that "[t]he definitions respecting 'commerce,' etc., remain substantially as in section 4 of the House bill." *Id.* at 18.

During the course of the debates on the Conference Report Congressmen Covington and Stevens acknowledged that the revised definition excludes commerce with possessions such as Puerto Rico, Guam, the Canal Zone and the Philippine Islands. 51 Cong. Rec. 14927, 14935. Congressman Stevens stated that foreign possessions were excluded because "conditions there are so different than here that they could be handled by local authorities better than by a commission 7,000 miles away in the city of Washington." *Id.* at 14935.

No one suggested that the change in language reduced the scope of the Commission's authority with respect to any commerce other than commerce with and within foreign possessions. Therefore, they must have assumed that the words "commerce among the several States" described all of the commerce "Congress has power to regulate under the Constitution," except foreign commerce and commerce with and within territories, possessions, and the District of Columbia.

The *Bunte Bros.* opinion did not discuss this legislative history. We are not suggesting, however, that *Bunte Bros.* should be overruled. As shown in the text (pp. 32–33, *supra*), *Bunte Bros.* was not based solely on the absence of "affecting commerce" language in the Federal Trade Commission Act, and in any event, the statutory interpretation question in *Bunte Bros.* is now moot. See Pub. L. 93–637, 88 Stat. 2183, 2193; n. 12, *supra*.

broaden the Act—is inapplicable to the Clayton Act. Neither the Department of Justice nor the Federal Trade Commission has interpreted the Clayton Act as inapplicable to local transactions affecting commerce, and neither has sought amendatory or clarifying legislation dealing with the problem.[15] The 1950 amendments, which dealt only with Section 7, did not focus on the commerce definition. Thus, those amendments cannot be read as reflecting a congressional intent that Section 7 be limited to interstate transactions.

Indeed, although the legislative history of the 1950 amendments contains no reference to the "engaged in commerce" phrase of Section 7, the discussion of the "any section of the country" language of that section is inconsistent with any suggestion that Congress

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[15] In any event, this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, casts considerable doubt on the continued validity of these factors in statutory construction. There this Court, in holding Section 7 of the Clayton Act applicable to bank mergers, rejected the argument that the passage of the Bank Merger Act of 1960 and enforcement policies of the Justice Department indicated that Section 7 did not reach bank mergers. With respect to the passage of the Bank Merger Act, this Court observed that (374 U.S. at 348–349) "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Although the Justice Department had at one time held the view that Section 7 did not reach bank mergers, this Court found that view to be a misunderstanding of the scope of Section 7, and as such not binding on the Court (374 U.S. at 349). See also *United States* v. *DuPont Co.*, 353 U.S. 586, where this Court rejected the Federal Trade Commission's view that Section 7 of the Clayton Act did not apply to vertical acquisitions.

intended to confine Section 7 to the flow of interstate commerce. The Senate Report observed (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 4):

> As the bill originally stood it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Implicit in this analysis is the assumption that as originally drafted the bill covered such local mergers. If Congress had thought that the "engaged in commerce" language excluded mergers of local firms, there would have been no need to adopt the "section of the country" language in order to exclude mergers of minor impact. Therefore, to the extent that the 1950 Congress considered the "engaged in commerce" language, it must have assumed that it covered firms engaged in local activities which substantially affect interstate commerce. Any other assumption would have conflicted with the basic purposes of the 1950 amendments, which were designed to make Section 7 a more effective instrument for preventing anticompetitive mergers.

Finally, even assuming the validity of the explicit language principle of construction, *Bunte Bros.* recognizes that it is not an absolute requirement and that

it should not be followed where "* * * the purpose of the Act would be defeated." 312 U.S. at 351. A restrictive interpretation of the Clayton Act "commerce" requirement would, as shown earlier (pp. 17–18, *supra*), frustrate the statutory purposes of the Act. Moreover, unlike Section 5 of the Federal Trade Commission Act, Section 7 of the Clayton Act embodies a "relatively precise" (312 U.S. at 353) prohibition and its enforcement is qualified by the requirement that the effect of transactions encompassed by that section "may be to substantially lessen competition, or to tend to create a monopoly." Thus, the application of Section 7 to local transactions substantially affecting commerce would not give a "* * * federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws" (*id.* at 354).

In *Gulf Oil Corp.* v. *Copp Paving, Inc., supra,* this Court recognized that our submission concerning the proper construction of the commerce requirement of the Clayton Act "is neither without force nor at least a measure of support" (slip op. 15). But the Court expressed doubt whether it would justify "radical expansion of the Clayton Act's scope beyond that which the statutory language defines * * *" (*ibid.*). As we have shown, however, if the language of the Act is read in the proper historical and linguistic context, it defines "commerce" as any commerce affecting more states than one.

Moreover, as we have pointed out, the Clayton Act, unlike the Federal Trade Commission Act, was never

accorded a restrictive construction by those charged with its enforcement. It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce. But that past enforcement pattern simply reflects the fact that the government has devoted its limited enforcement resources to areas where the need was most pressing. The rapid growth of the service sector of the national economy is of relatively recent origin and this case is a response to what the record shows is an increasing trend toward concentration in that sector. This case does not represent an attempt to effect a "radical expansion" of the scope of the Clayton Act, but is simply an application of the statute that is warranted by changing economic conditions.

The history and purpose of the Clayton Act as a whole, and Section 7 in particular, demonstrate that "engaged in commerce" means engaged in activities subject to federal commerce power, *i.e.*, activities in the flow of commerce as well as local activities that substantially affect interstate commerce. The government satisfied the commerce requirement in this case by establishing that the Benton companies were engaged in such activities at the time of the merger and acquisition.

II. THE BENTON COMPANIES WERE "ENGAGED IN COMMERCE" FOR PURPOSES OF SECTION 7 OF THE CLAYTON ACT

For the reasons set forth earlier, we submit that Section 7 of the Clayton Act, like the Sherman Act, applies to intrastate activities that substantially affect interstate commerce. In our view, it is unnecessary to determine whether Benton's activities were in the flow of commerce. "[T]he vital question becomes whether the effect [of the activities on interstate commerce] is sufficiently substantial * * *" (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra,* 334 U.S. at 234) and "it is enough if some appreciable part of interstate commerce" is involved. *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225.

The record in this case shows that the Benton companies engaged in activities that affect appreciable parts of interstate commerce. But even if it is assumed, contrary to our submission, that Section 7 is confined to firms engaged in the flow of commerce, the Benton companies' activities placed them in the flow of commerce.

1. The record establishes that the Benton companies' activities affected an appreciable part of interstate commerce.[16] The services that Benton performed for its customers had a significant effect upon the flow of commerce. Benton derived 80 to 90 percent of its revenues from customers who are engaged in selling goods in interstate and foreign commerce or in providing interstate communications (App. 146). It pro-

[16] This case thus differs from *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* where no evidence of effect on commerce was offered (slip op. 16). In *Copp,* the plaintiff relied solely on the fact that work was performed on interstate highways. This court held that such a purely formal nexus to interstate commerce was insufficient to satisfy the commerce requirement of the Clayton Act (*ibid.*).

vided essential services for many of the country's leading corporations including Mobil Oil, Texaco, Union Oil, Rockwell International, TRW, and Carnation. The price and quality of the janitorial services those companies purchase necessarily have an impact on their operations. Indeed, we submit that the character of these services placed Benton in the flow of commerce (see pp. 39–43, *infra*).

In order to provide services to its customers, Benton paid more than $150,000 per year to purchase or lease goods manufactured in other states (App. 145). Purchases of goods originating in other states have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320; *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186. Benton's purchases represent a substantial amount of interstate commerce. In *Katzenbach* v. *McClung*, 379 U.S. 294, this Court upheld the application of the Civil Rights Act of 1964 to a restaurant which purchased $70,000 worth of meat per year which had originated in other states. All of the restaurant's meat purchases were made through a local supplier. The Court concluded in *Fortner Enterprises* v. *U.S. Steel*, 394 U.S. 495, that a tying arrangement involving annual sales of $190,000 represented a substantial volume of commerce in the tied product. The Court said: "[W]e cannot agree with respondents that a sum of almost $200,000 is paltry or 'insubstantial.'" *Id.* at 502.

2. Assuming Section 7 requires a showing that an acquired company is engaged in the flow of commerce, the Benton companies' activities satisfy that standard.

The "flow of commerce" concept was developed in cases involving tangible commodities such as poultry, livestock, and grain for purposes of ascertaining when interstate commerce begins and ends. The actual performance of services is unlikely to involve a movement across state lines even though the services may be intimately related to interstate commerce. This Court's opinion in *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* implicitly recognizes that a mechanical formulation of "flow of commerce" is unsound. Thus, this Court described (slip op. 8) "flow of interstate commerce" as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." This Court's formulation encompasses, we submit, firms, such as the Benton companies, that perform a substantial amount of services for enterprises which are themselves engaged in interstate and international sales of tangible commodities and interstate communications.

Benton's involvement in the operations of its clients was more direct and significant than that of a supplier of goods. Companies such as TRW (App. 54–58) and Rockwell (App. 62–70) in effect "contracted

out" to Benton part of their operations performed on their premises and vital to their interstate operations.[17] Thus, Benton was directly engaged in the operations of interstate and international enterprises. Benton's services were an essential and important part of those operations.[18]

This Court has previously determined that persons who maintain buildings in which goods are produced are covered by Fair Labor Standards Act provisions applicable to employees "engaged * * * in the * * * production of goods for commerce." In *Kirschbaum Co.* v. *Walling, supra,* 316 U.S. at 524, the Court decided that firemen, engineers, watchmen, porters, carpenters and elevator operators employed by the owner of a loft building occupied by tenants who were engaged in garment manufacture were covered. The Court reasoned: "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." *Ibid.*

The *Kirschbaum* rule has subsequently been extended

[17] As noted at p. 6, *supra*. Benton's aerospace customers required exceptionally high maintenance quality as an integral part of production operations.

[18] See Affidavits of Charles V. Engle (TRW) (App. 54–58); Raymond Hernandez (Jet Propulsion Laboratory) (App. 59–61); Charles W. Moxley and John Blain (Rockwell) (App. 62–70); Donald E. Del Dosso (General Telephone) (App. 75–76); George G. Guest (Pacific Telephone) (App. 77–78); John Stover (Mobil) (App. 79–81); L. B. Higbee (Union Oil) (App. 82–83); Edward H. Patotzka (Texaco) (App. 84–85); Maynard Heider (Carnation) (App. 86–88); and Edmund Sakowicz (Teledyne) (App. 89–90). See also Affidavit of Dr. Philip Neff, the government's expert (App. 127, 133–137).

to maintenance workers at Borden Co.'s corporate headquarters (*Bordon Co.* v. *Borella,* 325 U.S. 679) and window washers employed by an independent contractor who supplies such services to manufacturing plants (*Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173).

Similarly, in the present case, Benton's janitorial services were so essential to and intimately connected with the operations of its customers as to be "an inseparable part of the flow of the interstate commerce involved." *Lorain Journal Co.* v. *United States, supra,* 342 U.S. at 152.

The conduct of Benton's business also involves other forms of interstate activity which can be appropriately viewed as engaging in the flow of commerce. In *United States* v. *International Boxing Club, Inc.,* 348 U.S. 236, this Court rejected claims that boxing cannot be interstate commerce because all the blows are struck within a particular state. The Court said: "A boxing match—like the showing of a motion picture * * * or the performance of a vaudeville act * * * or the performance of a legitimate stage attraction * * *—'is of course a local affair.' But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches * * *" (*Id.* at 241; citations omitted). The Court explained that the "controlling consideration * * * [is] a very practical one—the degree of interstate activity involved in the particular business under review." *Id.* at 243.[19] The

[19] See *Swift and Company* v. *United States,* 196 U.S. 375, 398: "[C]ommerce among the States is *not* a technical legal conception, but a practical one, drawn from the course of business." (Emphasis added.)

interstate activities involved in the promotion of boxing matches included the negotiations of contracts "with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than the state in which the promoters reside" (*id.* at 238); leasing arenas in states other than the promoter's residence, selling tickets across state lines, etc. (*id.* at 239).

The sale of building maintenance and building management services can involve similar interstate activity even if all of the services are performed in connection with buildings located within a single state. Many buildings in the Los Angeles area are owned by individuals who reside elsewhere or by corporations headquartered elsewhere. Therefore, the sale of the janitorial and property management services provided by Benton necessarily involves interstate communications, solicitations and negotiations (see App. 72). Such interstate activity should be viewed as part of the flow of interstate commerce.

In *United States* v. *South-Eastern Underwriters Assn.*, *supra*, 322 U.S. at 541, this Court found a fire insurance company engaged in "commerce among the several States," noting:

> Premiums collected from policyholders in every part of the United States flow into these companies [located, for the most part, in the financial centers of the East] for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and

> indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts.

Appellee contends that Benton's participation in such a "stream of intercourse among the states" is too insubstantial to place it "in" the flow of commerce. Appellee asserts that this is the case because the cost of Benton's interstate telephone calls during the eighteen months preceding the acquisition was $19.78 and the cost of 203 interstate mail items during that period was $22.33 (Motion to Affirm, p. 18). Appellee also states that "only a few of [the interstate mail items] * * * related to the solicitation or negotiation of contracts." *Ibid.*

The significance of interstate solicitations and interstate negotiations cannot be measured by the cost of the interstate communications. The value of the contracts which Benton sought or obtained represent a more meaningful measure of the substantiality of this interstate activity. The Tishman Plaza and the New York Life Insurance contracts, which were the product of negotiations with company executives based outside California, made a significant contribution to Benton's total revenues.[20]

[20] The data with respect to these contracts are contained in exhibits covered by the district court's protective order of June 2, 1971. The Tishman Plaza contract was executed by Tishman executives based in New York (Aff. of Alan D. Levy, App. 72). Benton personnel conducted extensive correspondence with New York Life personnel in New York in connection with the New York Life contract (Aff. of John D. Gaffey, App. 147–160).

Thus, Benton was "engaged in commerce" even if that phrase is interpreted to mean engaged in the flow of commerce rather than engaged in activities affecting interstate commerce.

CONCLUSION

The summary judgment of dismissal by the district court should be reversed and the case should be remanded for a trial on the merits.

Respectfully submitted.

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No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

On Appeal From the United States District Court for the Central District of California.

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Appellee.

On Appeal From the United States District Court for the Central District of California.

Brief for American Building Maintenance Industries.

QUESTION RESTATED.

May a corporation engaged in rendering janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state, be deemed "engaged also in commerce" within that clause of Section 7 of the Clayton Act?

PRELIMINARY STATEMENT.

Relying upon Section 7 of the Clayton Act, the complaint sought to invoke the remedies available under Section 15 of the Clayton Act against the acquisition by appellee of the stock of J. E. Benton Management Corporation and Benton Maintenance Company (together referred to in the complaint and herein as "Benton").

While the complaint did not allege that Benton was "engaged also in commerce" within the requirement of Section 7, that issue was raised by the motion for summary judgment and is the issue before this Court.

This appeal is from a summary judgment rendered on the basis of findings of fact and conclusions of law (App. 209-215). As stated by appellant in the Court below, its opposition consisted of "a total of 28 affidavits to establish that, in terms of commercial reality, Benton was engaged in interstate commerce" (App. 192).

Appellant makes no objection here to the District Court's use of summary judgment procedure, nor to the form of the judgment. Appellant does not suggest that it was in any way foreclosed from presenting all available evidence concerning the interstate commerce issues. On the contrary, the Government was afforded every opportunity to present its countervailing evidence. The Government carried on extensive discovery by means of interrogatories, depositions, demands for production of documents and its extensive review of defendant's records and files (App. 1-5). Moreover, appellant makes no specific objection to the findings, nor does it specify any particular in which the conclusions of law were not supported by the findings.[1]

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[1]Appellant's only objections to the lower court's findings are relegated to footnotes in its brief (App. Br. 7, 8, footnotes 5 and 7). Without reference to the fact that the local district court rules (Rule 3(g)) require that the moving party accompany his motion with proposed findings of fact and conclusions of law, and without reference to the fact that the Government filed no counter proposed findings and conclusions or any motion to correct the findings and conclusions filed by appellee, appellant complains that the District Court adopted "almost verbatim" appellee's proposed findings.

Appellant's extensive discovery during a two-year period confirmed the fact that Benton's activities were remarkably and intensely local.

Benton was exclusively devoted to rendering services. It rendered no service and it carried on no business outside of Southern California.[2] Benton used local labor exclusively and purchased its supplies in California from California vendors.[3]

Appellant's discovery developed that Benton's communications with those outside of California were astoundingly small. The cost of its interstate telephone calls for the period adopted by appellant as relevant was a mere $19.78.[4] During the year-and-a-half period selected by the Government, the United States mail was burdened by less than 200 letters to and from non-Californians.[5] Consistent and also astounding is the fact that *no* employee or official of Benton made an out-of-state business trip during the period (App. 51). It is almost impossible to conceive of a business organiza-

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[2]Findings 4, 11 (App. 211-212).

[3]Findings 16, 18 (App. 213-214). There were *de minimis* exceptions which appellant concedes were "admittedly small." The total amount thereof was "approximately $140.00" for the period selected by appellant (App. Br. 7, fn. 5). Appellant complains that "the findings do not *reflect* Benton's purchases of out-of-state products from local distributors." See, however, Findings 7, 17 and 18 (App. 212-214).

[4]Finding 15 (App. 213).

[5]That number included both incoming and outgoing communications. Contrary to appellant's statement all were not "mailed" by Benton (App. Br. 7). The "almost 200" included 32 communications to and from governmental bodies such as the Internal Revenue Service, leaving a total of 54 received from non-governmental sources and 117 mailed to non-governmental addressees. All of this shows, as to non-governmental mail, that Benton, during the 78-week period chosen by appellant, sent 117 letters (less than 1½ letters per week) to out-of-state addressees, and that 54 letters were written to it from non-Californians during the same period (App. 147-160).

tion (or even a private person) with fewer out-of-state contacts.

Faced with that convincing record, appellant wisely concluded that it could not comfortably anticipate being able to prove that Benton had been "engaged also in commerce" unless that phrase could be given a new meaning. The result was appellant's contention that a corporation is "engaged in commerce" if it is engaged in "local activities that substantially affect interstate commerce" (App. Br. 36). For that purpose appellant admits that it is required to depart from the "explicit language principle of construction" (App. Br. 34).

Notwithstanding the explicit requirement in Section 7 that the acquired corporation must be "engaged also in commerce," there is no allegation in the complaint that Benton was so engaged.[6] Being unable, or unwilling, to allege that statutory requirement appellant retreated to the position of alleging that Benton's vendors and customers were engaged in commerce:

> ". . . Both ABMI and Benton have purchased and received substantial quantities of janitorial supplies that *have been* shipped and transported across state lines and in interstate commerce. Janitorial service *customers* of ABMI and Benton have regularly engaged in commerce among the several states of the United States." (Complaint, Paragraph 8, App. 8.)[7]

Significantly, in the light of appellant's reliance here upon the assertion that Benton engaged in "local activities that substantially affect interstate commerce," there is no allegation in the complaint that Benton

[6]Finding 19 (App. 214).

[7]Emphasis herein is appellee's unless otherwise noted.

ever engaged in "activities that substantially affect interstate commerce," and of course there is no allegation as to what that "affect" might be.[8]

While there is nothing to show that appellant recognized any obligation to *allege* the "affect" on interstate commerce which it now asserts, there is recognition in its brief that it had the obligation to *prove* that Benton's activities had such an "affect." Appellant asserts that "the record establishes that the Benton companies' activities *affected* an appreciable part of interstate commerce" (App. Br. 37). However, there has been in fact no such showing. All that is shown is that Benton performed services in Southern California on property owned or leased by interstate operators and was paid for those services, and that Benton purchased in Southern California goods which had been brought into Southern California by Benton's vendors prior to the purchase. This is insufficient.

It is, of course, conceded that this appeal relates only to Benton's activities prior to its acquisition by appellee.[9]

[8]Not only is there a failure to allege what, if any, effect the operations of Benton prior to the acquisition had on interstate commerce, but there is a total failure to allege that the acquisition itself had any effect outside of California. The complaint merely alleges that the acquisition had its effect only "in Southern California and in the Los Angeles area" (App. 8). When asked in the interrogatories where the acquisition had its effect, appellant responded that "The sections of the country where the aforesaid acquisition and merger may have said effects are Southern California and the Los Angeles area" (App. 26).

[9]The question presented by the Government turns on Benton's pre-acquisition activities (App. Br. 2), and the Government limits its argument to those activities (App. Br. 5-7, 9, 11, 36-44). The express requirement of Section 7 that the acquired corporation "be engaged *also* in commerce" compels consideration

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SUMMARY OF ARGUMENT.

This brief will show that:

1. Benton was not "engaged also in commerce" and that issue was determined against the Government by *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974). Appellant's argument is based not upon any engagement of Benton in commerce but upon the activities of its customers and vendors in commerce and the contention is no more than the "purely formal 'nexus' to commerce" (95 S.Ct. at 400) argument unsuccessfully urged by Copp. Since Benton's "nexus" is even more tenuous than that urged by Copp, appellant cannot bring its case within the terms of Clayton 7.

2. Even if Clayton 7's "engaged in commerce" phrase could be construed to refer to activities "that substantially affect interstate commerce," appellant's appeal must fail because the allegation and proof of such "affect," required by this Court's decision in *Copp*, are totally lacking.

3. It was necessary and logical that Congress limit the applicaton of Clayton 7 to cases in which both the acquiring corporation and the acquired corporation were "engaged in commerce," and Congress explicitly did so. The Government's attempt to reconstruct Clayton 7 in its image of the Sherman Act is illogical and cannot withstand analysis of the differing purposes; principles, approaches and remedies of the Sherman and Clayton Acts. Without the narrow direction which Congress gave Clayton 7, it would be vague and lacking in standards.

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of its activities apart from the activities of the acquiring corporation and prior to the acquisition (the acquired corporation's activities necessarily cease upon acquisition).

4. Congress, the Federal Trade Commission and the Department of Justice have for 60 years rejected appellant's current interpretation of Section 7. There have been a significant number of occasions on which Congress has rejected broader commerce language with respect to Clayton 7. The FTC has not embraced appellant's interpretation of Clayton 7, and has recognized in connection with Section 5 of the FTC Act that Congressional action was necessary to expand its "in commerce" scope. Even the Department of Justice has, until now, interpreted Clayton 7 contrary to its present contention.

5. There is no support for appellant's contention that "changing economic conditions" require its attempted expansion of Clayton 7. There is no support for, or materiality to, appellant's suggestion that there was uncompetitive growth in the "service sector of the national economy," or that there was a trend towards concentration in that sector, or that any such growth or concentration in the overall "service sector" has any relation to the economic conditions in the janitorial service industry. The janitorial service business is highly competitive, and acquisitions in that business have less effect upon competition than in other types of businesses.

ARGUMENT.

I.

Benton Was Not "Engaged Also in Commerce" and That Issue Was so Determined in Gulf Oil Corp. v. Copp Paving Co.

Notwithstanding the recent determination in Section II of this Court's opinion in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392, 397-400 (1974), appellant continues to argue that Benton was "engaged also in commerce" within the terms of Clayton 7 (App. Br. 36-44). Appellant's assertion here is first, that because Benton rendered janitorial services in local buildings in some of which there existed interstate facilities owned by interstate operators, Benton, too, was engaged in commerce, and second, that because Benton purchased in Southern California from Southern California vendors some goods which happened to have been manufactured in other states, Benton was engaged in the commerce of its vendors. This is nothing more than the "purely formal 'nexus'" argument unsuccessfully advanced by Copp.

In reality, appellant's argument here has even less factual basis than Copp's. For instance, if an interstate baker with his plant in Los Angeles buys his flour from one who grows the wheat and grinds the flour wholly within California, appellant would be required to concede that the flour seller (like the asphalt seller in *Copp*) was not "engaged in commerce" within Clayton 7, but appellant would apparently nevertheless contend that the janitorial service corporation which contracted to sweep floors in the bakery would be "engaged in commerce." Such a result is obviously not sustainable.

The validity of the Court's determination in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974) cannot be disputed but appellant disregards its provisions. Therein the Court said:

> ". . . [T]he distinct 'in commerce' language in the Clayton . . . Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.
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> "If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." (95 S.Ct. at 398, emphasis by the Court)

Obviously there is no "flow of interstate commerce" in the intensely local activity of supplying janitorial services to buildings in Southern California, using for that purpose entirely local labor and supplies purchased from vendors in that locality.

Nonetheless, appellant continues to assert that "the Benton companies' activities affected an appreciable part of interstate commerce" (App. Br. 37). Appellant does so without any suggestion or showing as to what that "affect" was.

Admittedly, Benton's operations were limited to the rendition of services and "all of the facilities served by [Benton] were located in Southern California" (App. Br. 5). It is conceded that these services were rendered by using local labor obtained and supplies purchased in Southern California (with the exception of "direct inter-

state purchases which were admittedly small" (App. Br. 7, fn. 5)). Appellant's principal reliance for its attempt to show that Benton was nevertheless "engaged also in commerce" rests upon the fact that some of the buildings cleaned by Benton were occupied by interstate operators as lessees or owners[10] and upon the unsupportable assertion that two janitorial service contracts were negotiated by using interstate communications.

Realizing the insufficiency of asserting that Benton was "engaged in commerce" merely because its customers were so engaged, appellant refers to the fact that some of the rooms cleaned by Benton "required exceptionally high maintenance quality" (App. Br. 6) because they contained electronic or communications equipment operated by companies engaged in interstate commerce. The argument apparently is that because some rooms required a higher degree of cleanliness than other rooms, Benton became "engaged in commerce" when it contracted to clean the "clean

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[10]In this connection, appellant asserts (App. Br. 39-40) that Benton's involvement with its customers was "direct" and "vital," citing cases under the Fair Labor Standards Act and applying concepts developed therein. The applicability of the Fair Labor Standards Act cases, and their "nexus" concept, to the Clayton Act, was rejected in *Copp*, 95 S.Ct. at 399-400. Moreover, the record does not sustain the allegations of a direct and vital relationship. From every managerial, accounting, labor relations, tax, legal and other standpoint, Benton's janitorial services were separated from and not an "integral part" of the business of its customers:

> "When a building owner contracts for the cleaning and maintenance of his property, he need not worry about payrolls, federal, state and local income tax returns, labor relations and the whole range of management supervisory and bookkeeping problems." Appellant's Affidavit of Dr. Philip Neff (App. 134).

Like other suppliers of goods and services Benton suffered its own losses, assumed its own liabilities and realized its own profits.

rooms." This type of logic results in appellant's conclusion that "In these areas, janitorial maintenance was an integral part of production operations" (App. Br. 6). This contention is no more than, and in fact has less validity than, the "purely formal 'nexus' commerce" argument rejected in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974). The contention is that the "clean rooms" are instrumentalities of interstate commerce and that any conduct of Benton with respect to those rooms puts Benton "in commerce."

That concept was rejected in *Copp* as follows:

> "Copp's 'in commerce' argument rests essentially on a purely formal 'nexus' to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* 'in commerce.' Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. . . . The chain of connection has no logical end point. The universe of arguably included activities would be broad and its limits nebulous in the extreme." (95 S.Ct. at 400)

Appellant apparently does not contend on this appeal that Benton's purchase of supplies from local suppliers caused Benton to be "engaged in the flow of commerce" (App. Br. 39-44). This it reserves for its attempt to show Benton affected commerce (App. Br. 37-38). This forbearance is entirely proper, since Benton's purchases of supplies could never be a basis for finding that, despite the utterly local character of its janitorial services, it was engaged in the flow of commerce. Otherwise there would be "no logical end point."

Benton's purchases of supplies were incidental to its local janitorial activities, comprising approximately three percent of total amounts paid by customers for janitorial services. Benton had no requirements contracts with its suppliers, and there are no significant economies to be realized through bulk purchases of janitorial supplies.[11]

Appellant's assertion that "some of the [janitorial service] contracts were negotiated with out-of-state owners through the use of interstate communications facilities" (App. Br. 6-7) is not supported by the record, is contrary to fact and is just another "nexus" argument.

There is no support in the record for the assertion that the contracts to which appellant refers, the Tishman Plaza contract and the New York Life Insurance contract, were "negotiated . . . through the use of interstate communications facilities." There is in fact nothing in the record to show how or where these contracts were negotiated.

As to the Tishman contract, the record shows no more than that the New York office of Tishman "supervises and monitors" the nationwide operations of Tishman, and that the Tishman management in New York "is consulted before a major janitorial maintenance contract, such as the contract with Benton, is entered into." This general statement of Tishman's internal policies (App. 72-73) will not support appellant's statement.

As to the New York Life contract, appellant refers only to a list of some 200 interstate letters, sent or received by Benton, during a year and a half period

[11]Finding 17 (App. 213).

selected by appellant, which list contains no more than the date of each communication, its addressor and addressee (App. Br. 147-160). The list includes a number of communications from various Benton people to various New York Life people. However, the record is silent as to the content of these communications, and they accordingly furnish no evidence on any issue before the Court. The letters themselves, along with many other letters and documents, were produced to the Government but it elected not to make the content of any of the 200 part of the record.

With the help of the FBI, appellant's counsel engaged in an intensive examination of Benton's records over a period of several months, and engaged in other extensive discovery by means of interrogatories and depositions. All of the facts concerning the negotiations of Benton's contracts were available to appellant. If there had been any fact which could support appellant's assertion of interstate negotiation of contracts, it would have inserted the fact in the record. The conclusion is clear, therefore, that there was no such interstate negotiation.

Moreover, interstate negotiation is no more than just another "nexus" assertion. The fact is that Benton engaged in no janitorial service business except in Southern California. The mere fact that two of its customers happened to have home offices in New York, where the customer "supervises and monitors" *its* interstate business, or the fact that Benton communicated with such New York office cannot transform Benton's exclusively Southern California operation into an interstate business.

Even under the Sherman Act it is clear that jurisdiction cannot be sustained on the basis of interstate com-

munications conducted in the regular course of an otherwise purely local business. *John Kalin Funeral Home, Inc. v. Fultz,* 313 F.Supp. 435, 438-439 (W.D. Wash. 1970), *aff'd* 442 F.2d 1342 (9th Cir. 1971) *cert. den'd* 404 U.S. 881 (1971).

The mere fact that activities such as interstate boxing promotion and interstate insurance, which carry on their businesses in several states and which depend for their existence on interstate communications, are subject to the Sherman Act where a restraint of trade exists cannot mean that every purely local business which uses interstate communications incidentally is therefore "engaged in commerce" within the Clayton Act. Hence *United States v. International Boxing, Inc.,* 348 U.S. 236 (1955) and *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944) are not helpful to appellant.

Benton was not "engaged in commerce."

II.

There Is Nothing to Support Appellant's Contention That Benton Was Engaged in "Activities That Substantially Affect Interstate Commerce."

In *Gulf Oil Corp. v. Copp Paving Co.,* 95 S.Ct. 392 (1974), both Copp and the Government in its brief *amicus* sought a "radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation" (95 S.Ct. at 402). This contention as now stated in appellant's brief is that "engaged in commerce" means engaged in "local activities that substantially affect interstate commerce" (App. Br. 36). This attempt at "radical expansion of

the Clayton Act's scope" is disposed of in the following Parts III and IV of this brief.

If, however, as we shall now show, Benton's activities had no such "affect" on interstate commerce, affirmance of the judgment here is required, without more. For even if such a "radical expansion" could be allowed:

> "The plaintiff must allege and prove that apparently local acts in fact have *adverse* consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions." (*Copp,* 95 S.Ct. at 395)

Thus, in any event appellant was required to allege and prove that Benton prior to the acquisition engaged in "local activities that substantially affect interstate commerce."

There was no such allegation or proof. The complaint alleged no more than that Benton "purchased and received substantial quantities of janitorial supplies that *have been* shipped and transported across state lines and in interstate commerce," and that janitorial service *customers* of Benton "have regularly engaged in commerce among the several states of the United States." (Complaint, Paragraph 8, App. 8)

The proof went no further.

Appellant's allegations and proof are insufficient to show substantial or any, "affect" on interstate commerce. For instance:

1. There is no intimation, allegation or proof that any activity of Benton restrained or inhibited interstate commerce to any extent or in any degree, substantially or insignificantly.

2. There is no allegation and, except for the broadest generalities, there is no proof of the character or extent of the interstate trade of Benton's customers; there is no allegation or proof of the competitive market in which any such customer was engaged or of the market shares or of any other marketing factors pertaining to the market in which any such customer operated; there is no allegation or proof that Benton's activities for any customer had any substantial, or other, effect upon interstate commerce in the products or services of such customers.

3. There has been no effort or inclination to allege or prove that any vendor of any product to Benton made any sales to any vendee outside of California, or that such vendor was in any way engaged in the interstate sale of such products, and of course there was no suggestion of the extent of those sales.

4. There has been no attempt to allege or prove as to any product purchased by Benton the amount or volume of the interstate sales thereof, the extent, volume or market shares of the vendor of that product or any of the other market factors pertinent and necessary to show the "affect" any purchase by Benton in California may have had upon the interstate commerce in that product.

5. There has been a failure to allege and prove the dollar amount or volume, or any of the other market factors pertaining to any individual product purchased by Benton or the effect, if any, which Benton's purchase of that product may have had on the interstate trade in that product.

6. There has been no endeavor to allege or prove as to any Benton customer the relationship if any

between its janitorial service contracts with Benton and its janitorial service contracts with other contractors either in California or in other states.

7. There has been no endeavor to allege or prove as to any Benton customer any of the market factors which would be pertinent to a showing that Benton's activities for that customer were "local activities that substantially affect interstate commerce" in the janitorial service business.

8. There has been no effort to allege or prove that any interstate communication to or from Benton had any effect on interstate commerce in any product or service.

Apparently appellant has had no realization of the elements necessary to prove a substantial effect on interstate commerce. Instead, appellant is satisfied to rely only upon the "*affect*" *on Benton*. Thus appellant is satisfied to say that Benton's activities affected an appreciable part of interstate commerce because Benton received "80 to 90 percent of *its* revenues" from customers engaged in interstate commerce (App. Br. 37). Again appellant is satisfied to assert a substantial effect on interstate commerce merely from the fact that Benton "paid more than $150,000 per year" to local vendors for goods manufactured in other states (App. Br. 38). It is obviously illogical and insufficient to argue that interstate commerce was substantially affected by merely asserting that Benton was substantially affected.

Accordingly, as stated by this Court in *Copp*, " 'the effects on commerce' theory, even if legally correct, must fail for want of proof." (95 S.Ct. at 403)

III.

It Was Necessary and Logical That Congress Limit the Application of Clayton 7 and It Explicitly Did So.

A. The Limitation of Clayton 7 Was Logical and Necessary.

For the purpose of resolving the issue in this case, it is less than helpful to say that Clayton 7 was intended to complement or supplement the Sherman Act.[12] While it is true that the single word "commerce" needs the same definition in Sherman 1 and Clayton 7, the requirement here is the recognition of the distinction between the "restraint of trade or commerce" of Sherman 1 and "engaged in commerce" of Clayton 7. One may become a part of a conspiracy "in restraint of trade or commerce" and be subject to Sherman 1 even though he is not "engaged in commerce," and one may "engage in commerce" and be subject to Clayton 7 without being accused of being "in restraint of trade or commerce." Accordingly, it cannot be concluded that the reach of Sherman 1 and Clayton 7 are the same merely because each uses the word "commerce."

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[12]Because the two Acts share the common policy of promoting competition, *Transamerica Corp. v. Board of Governors,* 206 F.2d 163, 165 (3d Cir. 1953), stated that the Clayton Act "supplements" the Sherman Act. It would be illogical to argue that the shared policy of the two statutes requires they have identical intrastate reach, and *Transamerica* did not so hold. In *Transamerica* it was admitted that acquired and acquiring corporations were "engaged in interstate commerce" and therefore "within the purview of Section 7." Defendant argued that the acquisition should nonetheless be *exempt* from Clayton 7 because "Congress has not in the past regulated the banking business by legislation directed to corporations generally but rather by special banking legislation. . . ." The Court held, to the contrary, that banking is subject to Section 7. The Government wrongly characterizes that case as an "opinion which has addressed the question presented in this case" (App. Br. 25, fn. 11).

Proper analysis requires recognition that the two Acts have different purposes, principles, approaches and remedies. The Sherman Act is punitive and prohibitory. Its thrust is against actual, existing, visible and provable "restraints" upon commerce. It criminally punishes activities which have already restrained commerce, or civilly prohibits the continuance of existing restraints.

By contrast, Clayton 7 is designed to arrest certain activities "in their incipiency and before consummation. . . ." (S. Rep. No. 698, 63d Cong. 2d Sess. 1). It was enacted to provide preventive medicine not conceptually available under the Sherman Act. Unlike the Sherman Act under which the Government reacts to existing accomplished restraints, Clayton 7 may be invoked against a proposed acquisition, or against one that has been just accomplished if its future effect "*may be* substantially to lessen competition, or tend to create a monopoly." It may even be invoked against a very old acquisition whenever it "threatens to ripen into a prohibited effect."[13] Because relief under Clayton 7 is founded upon the reasonable probability of future restraints, economic theory is the important part of the resolution of Clayton 7 controversy, and must necessarily be based upon prophecy and opinion as to what the prospective future effect of an acquisition will be.

By contrast, much of the scope of the Sherman Act is covered by the *per se* concept, the use of which

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[13]*United States v. ITT, Continental Baking Co.,* 43 U.S.L.W. 4266, 4272 (U.S. Feb. 18, 1975); *United States v. DuPont,* 353 U.S. 586, 597 (1957).

eliminates any consideration of any economic theory as justification for the alleged *per se* violation. Even where "the rule of reason" is applicable, the emphasis is upon the factual restraint upon competition rather than upon any "reasonable probability" of a lessening of competition in the future.

Thus the Sherman Act is "broad" in its encompassing "every contract, combination . . . or conspiracy," but is "narrow" in its being limited to addressing conduct which *is* a "restraint of trade or commerce," and is "narrow" in the fact that it does not have facility to reach conduct which has a future "reasonable probability of adverse effect on competition." Clayton 7 is "broad" in its permitting a judicial determination of the future probabilities of a corporate acquisition, and in that under Clayton 7 the court is not nearly as inhibited by the facts as it is in dealing with the Sherman Act. However, Clayton 7 is "narrow" in its jurisdictional limitation to acquisitions made by one "corporation engaged in commerce" of the stock or assets of another "corporation engaged also in commerce." The structure of Clayton 7 is like Clayton 3. As Mr. Justice Frankfurter said of Clayton 3:

> "We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision." *Standard Oil Company of California v. United States,* 337 U.S. 293, 312 (1949)

As with Section 3, Clayton 7 has its broadly phrased qualification ("where . . . the effect of any such acquisition may be substantially to lessen competition, or tend to create a monopoly") of an otherwise

narrowly directed statutory provision ("no corporation engaged in commerce shall acquire . . . the stock . . . or . . . assets of another corporation engaged also in commerce"). It is this "narrowly directed provision" which appellant here seeks to avoid.

Appellant's contention is that each of the two "narrowly directed" provisions of Clayton 7 ("engaged in commerce" and "engaged also in commerce") means and includes "local activities that substantially affect interstate commerce" (App. Br. 36). Instead of being "a broadly phrased qualification of an otherwise narrowly directed statutory provision," Clayton 7 would become a statute without limitation as to the actors it would reach (because every business could "affect" interstate commerce in one way or other), and without any guideline as to the future except the vague concept embodied in the words "*may be* substantially to lessen competition."

Congress has customarily been unwilling to enact statutes granting that kind of unlimited power. At least Congress did not do so when it enacted Clayton 7. Since Clayton 7 was to deal with what "may be" the effect of an acquisition, it was normal, reasonable and proper for Congress to impose at least some factual restraint upon the jurisdictional scope of the executive and judicial power. In the case of Clayton 7, Congress explicitly provided a restrictive factual foundation which was required to be shown before the court could indulge in its determination of the reasonable probabilities.

Appellant would have this Court disregard the "narrowly directed statutory provision" of Clayton 7 and make its thrust the same as the Sherman Act under

which "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Association,* 336 U.S. 460, 464 (1949)

If one like Benton engaging in such an intensely local activity is to be deemed "engaged in commerce" it would be impossible to conceive of a corporate entity which would not be subject to the vague sanctions of Clayton 7 and the Congressional language would be nullified.

Moreover, if the intention is to newly construe Section 7 to require plaintiff to prove that both the acquired and the acquiring corporations be engaged in activities that "substantially affect interstate commerce," as under the Sherman Act (which seems to be appellant's contention when it says "we submit that Section 7 of the Clayton Act, *like the Sherman Act,* applies to intrastate activities that substantially affect interstate commerce"[14]) the result would be to require preliminary proof "like the Sherman Act" in each case under Clayton 7 before any lessening of competition could be reached.

Significantly, Clayton 7 is the only antitrust legislation the vagueness of which required the documentation by the Department of Justice of "Guidelines."[15] Even when the guidelines were issued, the Department of Justice was careful to say therein that they could not be taken as "conclusive," and that Justice Department activity might "necessarily be based upon a more complex and inclusive evaluation," and that the Department "seeks primarily to prevent mergers which change

[14]App. Br. 36-37.

[15]1 CCH Trade Reg. Rep. ¶ 4510.

market structure in a direction *likely to create* a power to behave non-competitively in the production and sale of any particular product."

It was natural, logical and proper for Congress to limit the application of Clayton 7 to situations in which both corporations were "engaged in commerce."

B. Clayton 7 Is Clear and Explicit.

Both as enacted in 1914 and as reenacted in 1950, Congress applied the prohibitions of Section 7 to corporations only. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent and effect of his acquisitions, is, or has been, subject to its prohibitions. Similarly no acquisition even by a corporation of a business of an individual or of a partnership or of an unincorporated business association can violate Section 7, regardless of the extent of interstate activity involved or the anticompetitive effect.

When initially enacted in 1914, Section 7 did not purport to "exercise the full extent" of Congressional power since it applied only to the acquisition of stock. No acquisition of assets, no matter how large, and regardless of the extent or the effect of the acquisition, was then subject to its prohibitions. In 1950, when the provisions of Section 7 were extended to cover the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover in the enactment of Section 7 in 1914, and its reenactment in 1950, Congress explicitly provided that it applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." No matter how

extensive the operations of one party to the transaction, it is clear that Section 7 cannot apply unless both parties to the transaction were so "engaged."

Under the Government's premise here, Congress had the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

Moreover, Congress did not do so either in 1914 or in 1950 notwithstanding the fact that at both times it had before it, as a model if it intended to utilize its full power, the all inclusive provisions of the Sherman Act, which in Section 1 was explicitly made to cover "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."[16] And in Section 2 it was explicitly made to cover "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States. . . ."[17] The election of Congress not to follow the all inclusive kind of language found in the earlier Sherman Act demonstrates that Congress did not in Section 7 of the Clayton Act exercise, or intend to exercise, "the full extent of its constitutional power to regulate commerce." Accordingly, cases defining the scope of the Sherman Act, which the Government cites, are not helpful to any determination of the scope of Section 7 of the Clayton Act.

The Government's argument disregards the fact that Section 7 has not one but three prerequisites to its application:

> *First*, the acquiring corporation must be "engaged in commerce";

[16]Sherman Act, §1 (15 U.S.C. §1).

[17]Sherman Act, §2 (15 U.S.C. §2).

> *Second*, the acquired corporation must be "engaged also in commerce"; and
>
> *Third*, the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

By contrast, Sections 1 and 2 of the Sherman Act have only the single standard of application, *viz.*, the anti-competitive effect on commerce of the defendant's conduct. The Government would have this Court disregard the fact that in Section 7 Congress, separately and apart from its definition of the parties made subject to its prohibition, defined the action by those parties which was prohibited. No one has contemplated that any but a small percentage of corporate acquisitions would be subject to Section 7. For instance there were 3,158 mergers recorded in 1972 and 2,836 mergers recorded in 1973, only a few of which were challenged by the Department of Justice or the Federal Trade Commission.[18]

Section 7 is not the only Clayton Act section which on its face is narrowly directed in numerous respects.[19] As with Section 7, multiple additional limitations appear on the face of the other Clayton Sections.[20] The

[18]Federal Trade Commission News Release of November 1, 1974.

[19]Clayton 7 does not apply even to corporations, if they purchase the stock of another corporation engaged also in commerce "solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." Nor will a corporation engaged in commerce violate the Section if it causes "the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

[20]Clayton Section 2(a), as amended by the Robinson-Patman Act (15 U.S.C. §13(a)) applies to "any person *engaged in com-*

(This footnote is continued on next page)

courts, in applying Clayton 7's companion sections, have given them restricted interpretation consistent with their narrow language and scope. Thus this Court concluded in its *Copp* opinion, that the facially narrow language of Section 2(a) and its legislative history compelled restrictive interpretation (95 S.Ct. at 401). Similarly, the cases interpreting Clayton 3 have given it limited sweep. We have seen no case in which a court has ever applied that section to a person not involved in the flow of interstate commerce.[21]

As will be shown hereinafter, Congress throughout the 60-year history of Clayton 7 has maintained the "narrowly directed" character of the statute against all efforts to change its character.

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merce, in the course of such commerce" and Clayton Section 3 (15 U.S.C. §14) applies to "any person *engaged in commerce, in the course of such commerce.*" Further, Section 2(a) and Section 3 have application only to "commodities." *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872, 875 (7th Cir. 1969).

Clayton Section 8 (15 U.S.C. §19) pertaining to corporate interlocking directorships applies to only a limited area of interlocks. Thus even between two direct competitors there is no prohibition against an officer of one (but not a director) being a director of the other, because the Act applies only to the situation in which the person is a director of both. And Section 8 does not cover vertical interlocks (between a seller and a buyer) which could be anticompetitive.

Recognizing its limitations the Justice Department now seeks to broaden Section 8 by Amendment. Antitrust & Trade Reg. Rep., No. 695, p. A-1 (Jan. 7, 1975).

[21]The defendants in *Standard Fashions Co. v. Magrane-Houston Co.*, 258 U.S. 346, 351-352 (1922) (cited in appellant's brief *amicus curiae* in *Copp*) and the defendants in *Standard Oil Co. v. U.S.*, 337 U.S. 293, 295 (1949) (cited by this Court in *Copp*, 95 S.Ct. at 402, fn. 18) transacted business across state lines and were thus clearly "engaged in commerce" as required by Clayton Section 3.

IV.

For 60 Years Congress, the FTC and the Department of Justice Have Rejected Appellant's Current Interpretation of Section 7.

A. Throughout the History of the Clayton Act, Proposals to Congress to Incorporate the "Effect on Commerce" Concept Have Been Rejected.

We have shown that Congress logically and explicitly limited the application of Clayton 7 to corporations "engaged in commerce." Notwithstanding this foundational fact, there have been from time to time efforts to inject into Section 7 and other portions of the Clayton Act the "effects on commerce" concept which the appellant here urges. These proposals have been uniformly and properly rejected.

The Government persists in urging (App. Br. 24-25) that Congress simply did not consider the meaning of the words "engaged also in commerce" in enacting Clayton 7 in 1914, or in amending it in 1950, or at any other time from 1914 to present. This is not only an unflattering view of Congressional draftsmanship, it is contrary to the facts in the legislative record.

The Government refers to the fact that Congress considered and rejected a version of Section 2(a) of the Robinson-Patman Act which would have made it applicable to discriminatory sales by "any person, ***whether in commerce or not***." Appellant states, "There is no comparable evidence of a conscious Congressional decision to reject arguably broader commerce language with respect to Section 7" (App. Br. 24). However, the legislative history of Section 7 reveals not only "comparable" but *better* evidence of a conscious decision to reject broader commerce language.

Following its enactment Clayton 7 was almost constantly before Congress. The first bill to amend Section 7 was propounded to the Senate in 1921.[22] The 1914 version of Section 7 did not bar the acquisition of assets and this Court so construed the statute in 1926,[23] and again in 1934.[24] This deficiency or "loophole"[25] was the principal impetus for the intense legislative re-examination of Clayton 7 which took place in the years from 1937 to 1950. During that period at least 19 bills to amend Section 7 were propounded in Congress.[26] Three separate sessions of full public hearings were held on various of the proposed amending bills.[27]

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[22]S.277, 67th Cong., 1st Sess. (1921).

[23]*Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554, 563 (1926).

[24]*Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587, 599 (1934).

[25]"Although proponents of the 1950 amendments to the Act suggested that the terminology [omitting coverage of asset acquisitions] employed . . . [in the 1914 version of Section 7] was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views. The possibility of asset acquisition was discussed, but was not considered important to an Act than conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock." *Brown Shoe Co. v. United States*, 370 U.S. 294, 313-314 (1962).

[26]H.R. 7371, S.2549, 75th Cong., 1st Sess. (1937); H.R. 10176, S.3345, 75th Cong., 2d Sess. (1938); S.577, H.R. 1517, 78th Cong., 1st Sess. (1943); S.615, H.R. 2357, H.R. 4519, 79th Cong., 1st Sess. (1945); H.R. 4810, H.R. 5535, 79th Cong., 2d Sess. (1946); S.104, H.R. 515, H.R. 3736, 80th Cong., 1st Sess. (1947); H.R. 7024, 80th Cong., 2d Sess. (1948); S.56, H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734, 81st Cong., 1st Sess. (1949). Annually from 1927 to 1950 the Federal Trade Commission recommended amendment to §7. *Section 7 Of The Clayton Act: A Legislative History*, 52 Colum. L. Rev. 766, 766-767 (1952).

[27]Public hearings were held on H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 515, 80th Cong., 1st Sess. (1947); H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734, 81st Cong., 1st Sess. (1949-1950). (See *Brown Shoe Co. v. United States*, 370 U.S. 294, 312, fn. 19; and see *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives on H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734, Wednesday, May 18, 1949).*

It is little short of preposterous to say, as does appellant, that Congress never consciously considered the significance of the words "engaged also in commerce" (App. Br. 24-25). One would assume that careful legislators would be concerned with the significance of each word in the statute they were drafting, more particularly where the language delineated the jurisdiction, the very power of the courts to act under the statute.

But one need not make assumptions. No less than six of the bills considered from 1943 to 1950[28] (three of which were considered in the three separate sets of public hearings[29]) proposed to add to Section 7 the following language requiring premerger review and approval by the FTC, and importing into the statute a much broader jurisdictional test reaching activities "affecting commerce":

> "Wherever the consummation of any plan, undertaking or agreement by or on behalf of any corporation *engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce* or by or on behalf of any of its subsidiaries so engaged, to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more

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[28]S.577, H.R. 1517, 78th Cong., 1st Sess. (1943); S.615, H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 1240, 81st Cong., 1st Sess. (1949).

[29]H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 1240, 81st Cong., 1st Sess. (1949).

> than $....., no such plan, undertaking, or agreement by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of the Clayton Act, as amended, shall be consummated, effectuated, and completed except upon and after compliance with the following requirements: . . ."[30]

These proposed amendments to Clayton 7 were rejected after public hearings.

Thus, during the seven years prior to the 1950 amendments to Section 7, in both House and Senate bills considered in public hearings, proponents of amendments sought to engraft onto Section 7 precisely that "affecting commerce" language which the Government contends Congress never consciously considered. Sponsors of this proposed broadening language included Representative Kefauver (H.R. 2357, 79th Cong.) and Senator O'Mahoney (S.577, 78th Cong.; S.615, 79th Cong.; S.104, 80th Cong.), leaders of the move to amend Section 7. These men must have recognized that Clayton 7's "engaged in commerce" language reached only corporations engaged in the flow of commerce. They were doubtless aware of this Court's 1941 decision in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, narrowly interpreting the words "in commerce" in Section 5 of the Federal Trade Commission Act,[31] enacted concurrently with and

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[30]This is the exact language appearing in each of the bills noted in footnote 28.

[31]Section 5(a)(1) of the FTC Act formerly provided:
"Unfair methods of competition *in commerce* and unfair or deceptive acts or practices *in commerce*, are hereby declared unlawful."
It has since been amended. See footnote 40.

as a complement to the Clayton Act. In *Bunte* this Court said:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." (312 U.S. at 355)

In 1950 Congress had before it not only *Bunte Bros., supra,* but Sherman Act cases employing the "affecting commerce" concept.[32] The plainly available "affecting commerce" concept appeared in no less than six bills proposing amendment to Clayton 7, and was rejected, as we have shown.

The framers of the proposed "engaged in or affecting commerce" language in the bills to amend Clayton 7 recognized that the reach of Section 7 could be broadened to embrace corporations whose activities "affected commerce" only by making the statute say so. Moreover, they recognized that the "affecting commerce" language would greatly expand Section 7's reach, and that therefore some limitation upon the operation of the statute was necessary. Accordingly, the proposed review and approval procedures were to be limited to acquisitions in which "property to the value of more than $....." would be involved. No

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[32]For instance, *The Shreveport Rate Cases*, 234 U.S. 342, 356, 358 decided in June of 1914, four months prior to enactment of the Clayton Act; *Apex Hosiery v. Leader*, 310 U.S. 469, 484 (1940); *United States v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948).

such dollar restriction was proposed with respect to the first paragraph of Clayton 7 since its sweep was to remain limited to "acquisitions by corporations engaged in commerce" of "corporations engaged also in commerce."

Congress in 1950 reenacted the same limited jurisdictional language it placed in the statute in 1914, despite all of the years of considering amendments to Section 7 which would have changed the "engaged in commerce" requirement, despite extensive public hearings, despite numerous proposed amending bills, and despite the holding in *Bunte Bros., supra.*

But 1950 was not the last occasion on which Congress considered and consciously rejected broadening the commerce language in Section 7. In April of 1958 the Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, held hearings on two bills which would have, among other things, changed the commerce requirement of Section 7.[33] Each of these bills would have broadened Clayton 7 by making it applicable wherever "*either* the acquiring corporation, *or* the corporation from which such stock, share capital or assets are acquired, is engaged in commerce. . . ."[34] Public hearings were held on these proposals at which men eminently qualified to interpret Section 7's commerce requirements, and the proposed amendments, advanced their views:

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[33]S.198, 85th Cong., 2d Sess. (1958), sponsored by Senators Kefauver and O'Mahoney; S.722, 85th Cong., 2d Sess. (1958), sponsored by Senators Sparkman and Thye.

[34]Texts of these bills appear in *Hearings on Legislation Affecting Sections 7, 11, and 15 of the Clayton Act Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S.Res. 231 on S.198, S.721, S.722, S.3479,* 85th Cong., 2d Sess. (1958).

"Senator Sparkman.

* * *

"Third, the bill would amend Section 7 of the Clayton Act so as to make the statute applicable to monopolistic mergers where either the acquiring or the acquired corporation is engaged in interstate commerce.

"At present, the antimerger law is, as you know, applicable only where the acquired corporation is engaged in commerce. As a result, *in cases where the acquired corporation is engaged exclusively in intrastate commerce, the enforcement agencies lack jurisdiction to proceed under Section 7,* no matter how seriously anticompetitive the effects of the merger may be."[35]

* * *

"Senator Kefauver. Another provision of your bill S.722 is in connection with whether the corporations are engaged in interstate or intrastate commerce. Is that correct?

"Senator Sparkman. Yes.

"Senator Kefauver. As matters now stand, must both of them be engaged in interstate commerce?

"Senator Sparkman. That is correct. The acquired company must be engaged in interstate commerce—

"Senator Kefauver. The acquired company?

"Senator Sparkman. Yes, and the acquiring.

"Senator Kefauver. Both the acquired company and the acquiring company?

"Senator Sparkman. Yes.

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[35]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra,* (see fn. 34).

"Senator Kefauver. What does your bill do in that connection?

"Senator Sparkman. It makes it applicable if *either* company is engaged in interstate commerce."[36]

* * *

"Senator Kefauver. As the law stands now, both must be.

* * *

"Mr. Dixon.[37] It is that, I will assure you, and the first four or five sentences of Section 7 definitely make that so.

[Here Dixon reads opening portion of Clayton 7.]

"So the requirement is very definitely, today, that they both must be in commerce for the Section 7 to apply.

* * *

"There is some dispute as to the difference between 'in commerce.' *The 'in commerce' test is quite different from 'affecting commerce,' as you recognize.*[38]

Senators Sparkman and Kefauver, and Mr. Dixon all accepted without question that Clayton 7's language requiring the acquired corporation be "engaged also in commerce" meant engaged in the flow of commerce, and that the proposed amendments were necessary to

[36]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra* (See fn. 34) at 24-25).

[37]Paul Rand Dixon, then Counsel and Staff Director to the Sub-Committee on Antitrust and Monopoly, subsequently Chairman of the Federal Trade Commission.

[38]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra* (See fn. 34), at 83-84.

extend Clayton 7's reach to corporations whose local activities merely "affected" commerce. Congress did not enact the proffered bills.

Since 1958 Congress has passed up at least two more distinct opportunities to broaden the commerce language of Section 7. In 1966 it had before it and passed the Bank Merger Act of 1966 without otherwise changing Clayton 7.[39]

The most recent consideration of the statutory "in commerce" phraseology occurred when Congress was asked to, and did in January of this year, amend Section 5 of the FTC Act by changing its phrase "in commerce" to read "in or affecting commerce." Notwithstanding the fact that the FTC Act and the Clayton Act were companion statutes when enacted in 1914, and bear a close relationship to each other, Congress did not embrace the opportunity to make any such change in Clayton 7.[40]

There can be no question but that Congress knew what it was doing when it omitted from Clayton 7 the "affecting commerce" concept in 1914, when such amendments were proposed before and during 1950, when it considered amendments to Clayton 7 in April of 1958, when it had before it the scope of Clayton 7 in 1966 and when it selectively adopted the "affecting commerce" concept in amending Section 5 of the FTC Act this year.

[39]12 U.S.C. §1828(c).

[40]Magnuson-Moss Warranty and Federal Trade Commission Improvement Act §201(a) Pub. L. 93-637, 88 Stat. 2183, 2193, changing §5 of the FTC Act (15 U.S.C. §45) as follows:

"unfair methods of competition [in commerce] *in or affecting commerce* and unfair or deceptive acts or practices [in commerce] *in or affecting commerce*, are hereby declared unlawful."

With this legislative history Congress cannot be held to have intended a result which it so many times declined to enact.

B. The Federal Trade Commission Has Explicitly Rejected the Interpretation Now Urged by Appellant.

Notwithstanding the well known penchant of administrative bodies toward increasing their administrative jurisdiction, the FTC has adhered to the view that Section 7 does not reach local acquisitions. In *In re Foremost Dairies, Inc.*, 60 FTC 944, 1068 (1962), the Commission in an opinion by Chairman Paul Rand Dixon stated that Section 7 "applies only to an acquisition in which both the acquired and the acquiring companies are engaged in commerce." The Commission upheld the hearing examiner's finding that respondent Foremost's acquisition of Florida Dairies Company, a dairy selling exclusively in Florida and purchasing dairy products from a local wholesaler who had previously purchased these items from out-of-state, did not violate Section 7 since Florida Dairies was not engaged in commerce within the meaning of Section 7 (60 FTC at 1090).[41]

Notwithstanding that the FTC and its long-time Chairman, Mr. Dixon, repeatedly affirmed the limited reach of Section 7, the FTC has never sought to amend the section to embrace acquisitions of local businesses. Nor is this because the FTC refrains from lobbying. Indeed it campaigned concertedly for over 20 years for the amendments to Section 7 enacted in 1950.[42]

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[41]The Commission subsequently indicated its continued approval of this position in *In re Ecko Products Co.*, 65 FTC 1163, 1209 (1964) and in *In re Beatrice Foods Company*, 67 FTC 473, 730-731 (1965).

[42]See footnote 26, *supra*.

As we have seen above while the FTC this year found an expansion of its jurisdiction under Section 5 of the FTC Act to be desirable, the FTC did not consider it desirable to similarly seek to change Clayton 7.[43]

C. Appellant's Brief Makes It Clear That the Department of Justice Itself Has Since 1914 Rejected the Interpretation It Now Proposes.

Unlike Congress and the FTC, the Department of Justice does not normally document its refusal to exercise its authority. However, in appellant's brief the "past enforcement pattern" of the Department of Justice is revealed:

> "It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce." (App. Br. 36)

While the appellant does not disclose when and the extent to which it rejected Section 7 cases where the acquiring and the acquired corporations were not "engaged in the flow of commerce," it is reasonable to assume that among the thousands of mergers each year there must have been a number of instances in which the filing of a Clayton 7 case was rejected by the Department of Justice because one or the other of the corporations was not "engaged in commerce." That there must have been such occasions is implicit in appellant's statement that its:

> ". . . past enforcement pattern simply reflects the fact that the government has devoted its limited enforcement resources to areas where the need was most pressing." (App. Br. 36)

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[43]Thus, Section 5(a)(1) was changed as follows: "Unfair methods of competition *in or affecting commerce* . . . are hereby

(This footnote is continued on next page)

The "Merger Guidelines" issued by the Department of Justice on May 30, 1968 also demonstrate that the Department of Justice has never before conceived that it had the power to attack a merger except where "both the acquiring and acquired firms [are] engaged in the flow of commerce." Notwithstanding that "The purpose of these Guidelines is to acquaint" the public "with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act" and notwithstanding the fact that the "Guidelines" discussed all of the other language and elements of Clayton 7, no reference of any kind was made to a possible interpretation which would expand the "engaged in commerce" phrase of Clayton 7.[44] And the "Guidelines" have remained unchanged.

V.

There Is No Support for Appellant's Contention That "Changing Economic Conditions" Require Its Attempted Expansion of Clayton 7.

Appellant has repeatedly asserted, as it must, that this appeal is concerned only with the pre-merger activities of Benton.[45] In so doing, appellant has conceded that there is no issue on this appeal as to the effect of the acquisition or the lack of such effect. Moreover appellee has conceded that ABMI, the acquiring company, is and has been engaged in commerce.

declared unlawful." Any similar amendment to Clayton 7 presents a dilemma. It is one thing to legislate with reference to "*unfair* methods of competition in or affecting commerce," but quite another thing to prescribe "activities affecting commerce" without describing at least in general terms what category of activities are legislatively intended.

[44]1 CCH Trade Reg. Rep. ¶4510.

[45]App. Br. 5-7, 9, 11, 36-43.

Inconsistently, and we believe improperly, appellant has injected into this appeal the activities of ABMI and its acquisition history. Perhaps this is done to lend credence to its assertion that "changing economic conditions" call for a new definition to the statutory terms "engaged in commerce" and "engaged also in commerce." All this, notwithstanding appellant's admission that for all of the sixty years of the existence of Clayton 7:

> "It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce." (App. Br. 36)

However, the facts with regard to this defendant and insofar as they relate to its history are not properly stated.

The Government's change of policy with reference to Clayton 7 is said to be occasioned by the "rapid growth of the service sector" (App. Br. 36). In so stating, appellant is conglomerating together in one "sector" all who render services which apparently includes all industry except the parts which provide material commodities. According to appellant's proof, the so-called "service sector" includes:

> ". . . establishments primarily engaged in providing a wide variety of services for individuals, business, and government establishments, and other organizations. Hotels and lodging places; establishments providing personnel, business, repair, and amusement services; health, legal, engineering, and other professional services; educational institutions; membership organizations and other miscellaneous services are included." (App. 128)

The fallacy in using the "service sector" as a basis for drawing conclusions as to the janitorial services industry is apparent. To do so is like drawing a conclusion with regard to the manufacture of shoes by lumping all manufacturing establishments in one sector. Others in the universe of the "service sector" by their nature are dependent for the rendition of their services on skilled personnel or skilled labor. The janitorial service industry by contrast basically relies upon the unskilled labor force.

Appellant's assertion that it must be allowed to expand the meaning of Clayton 7 because of the "rapid growth of the service sector of the national economy," and because of the "trend toward concentration in that sector," which by implication furnishes a "most pressing" need for a new interpretation of Clayton 7 cannot withstand analysis.

In the first place, except for generalized conclusionary statements, there is no support for appellant's assertions (App. Br. 36). In the second place, there is no factual showing from which one may conclude that growth in the all inclusive "service sector" means that there was also such growth in the janitorial service industry, or that the trend towards concentration in the all encompassing "service sector" means that there was also a trend towards concentration in the janitorial service business, or the extent of that concentration. Moreover, there is not the slightest factual showing that growth in the "service sector" or concentration therein has been detrimental to competitive conditions. Much less, is there any such showing within that part of the "service sector" which is included within the janitorial service business.

It is difficult to conceive of an industry in which entry is easier or vigor of competition greater than the janitorial service business.[46] The authority on which appellant relies for its generalized assertion that there is a trend toward concentration in the janitorial service industry is the Urban Business Profile, Building Service Contracting, SIC 7349, U.S. Department of Commerce, Economic Development Administration, Office of Minority Business, April, 1972, EDA-72-59582 (App. 143) which contains a more significant description of the industry as follows:

> "The attractiveness of this [building maintenance] market and its relative ease of entry have caused a high level of competition among building maintenance contractors. Firms obtain business largely on the basis of price competition in bidding, though an established reputation for reliability is also important." (page 1)
>
> * * *
>
> "Contracts are generally for 1 year, with either party entitled to terminate upon 30 days notice." (page 4)
>
> * * *
>
> The customer "may have the option of:
>
> (1) doing his own janitorial and other maintenance work; or
>
> (2) contracting such work to the building services." (page 5)
>
> * * *

[46]Telephone directory "yellow pages" within the Los Angeles area defined by the Government disclose the names of over 1,000 firms within the industry category specified by the Government. See Exhibit "O" to defendant's answers to interrogatories filed June 9, 1971.

"Building services contracting has traditionally been a labor intensive business. The main expense item of any contractor is his payroll. In a sense, the contractor is merely a 'labor broker' who handles personnel problems for the building owner." (page 6)

* * *

"The employees of a building services contractor are, for the most part, unskilled." (page 7)

* * *

"The largest form of competition the building services contractor has to face outside of his own industry is in the form of buildings which do their own in-house maintenance." (page 9)

* * *

"The growing market for the building maintenance services industry does not insure high margin and ease in securing work. However, a great many small contractors in this field assure intensive bidding competition, with the emphasis on shaving prices. Cost of maintenance is a primary determining factor in the choice of a building services contractor, and the building owner will, reputation for quality and reliability being equal, choose the contractor who comes in with the lowest bid for the job required." (page 9)

* * *

"The ease of entry into building services contracting is attested to by the large number of firms beginning operations each year." (page 10)

* * *

"The labor force used by a building services contractor is, for the most part, unskilled. Although the wages are low, recruitment of employees is rarely a problem." (page 17)

Thus, appellant's source for its assertion of changing economic conditions which warrant a new "application" of Clayton 7 demonstrates that there does not exist in the industry any such "most pressing" need for expansion of the statute.

Part of appellant's reliance for proof of "changing economic conditions" is its reference to the *National Kinney Corp.* case (App. 143). The history of that case[47] is hardly consistent with appellant's assertion today of a "most pressing" need for anti-merger action in the janitorial service business. Contrary to appellant's assertion, National Kinney Corp. did not become "one of the two leading firms" in the industry solely "as a result of some 60 acquisitions between 1962 and 1966," but National Kinney is one of the largest in the United States by virtue of the merger between Kinney and National, National already being one of the largest in the industry. The stipulation of the Department of Justice permitted the merger to be consummated.

With regard to that part of the janitorial service business which is appellee's, proof is particularly lacking and inexact. Serving as it does 500 communities in the United States and Canada, appellee is "large" and includes other types of business besides janitorial service business. Appellee, during the 12-year period between

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[47]1966 CCH Trade Cases ¶71,814; *Merger Case Digest, 1971,* 125-DJ, 442-444.

1961 and 1973 made, according to appellant's assertion, 54 acquisitions. The actual facts with regard to appellee's acquisitions are stated in Mr. Rosenberg's affidavit (App. 170-175), and are interesting:

1. If one includes every possible "acquisition" which could be included within that term, there were not 54 but 48. Four of these corporations were acquired in 1961 when the Rosenberg brothers, owning all the stock of the 4 companies and most of the stock of the appellee contributed the stock of the 4 companies to appellee. Another 7 of the so-called "acquisitions" were not in fact acquisitions but were companies established in the first instance by appellee, or which became a part of appellee when it was incorporated. Twenty-two of the so-called acquisitions were not janitorial service companies at all, and were companies whose business was explicitly excluded from the area of this case by appellant's answers to interrogatories (App. 17-18). This leaves 15 acquisitions of janitorial companies over the 12-year period selected by appellant.

2. The facts with regard to the 15 janitorial service companies acquired are significant. In no one of these acquisitions did the tangible assets exceed $33,000.00. In no one of these acquisitions did the purchase price exceed $555,000.00. In 8 of the 15, the purchase price was less than $100,000.00. The acquired companies were located in various cities of the country. Only 5 were in California.

3. The small amount of tangible assets involved in the acquisition of janitorial service companies is occasioned by the fact that the only significant asset of such a company is its right to perform its service contracts. This right is hardly an asset the acquiring of

which could substantially lessen competition, since the contracts are by custom in the trade terminable by the customer at any time on 30-days notice. The acquisition of Benton was no different.

Beyond the 30-day period the acquiring company had no hold upon the customers of Benton which could lessen competition. There was no acquisition here of any manufacturing plant, any sales or distribution outlets, any tangible product line, any patents or scientific know-how, or any location or business situs advantage.[48] In short, this was not an acquisition "where the need was most pressing" for a proceeding under Clayton 7, or where the effect could have been "substantially to lessen competition, or to tend to create a monopoly." The "changing economic conditions" assertion is one which more properly should be addressed to Congress.

Conclusion.

The District Court's summary judgment of dismissal should be affirmed.

DATED: Los Angeles, California, April 3, 1975.

Respectfully submitted,

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[48]Finding 12 (App. 213).

Supreme Court, U. S.
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No. 73-1689

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Appellee, ignoring the legislative history of the 1914 Clayton Act, cites no authority for its contention that Congress intended to limit the application of the Clayton Act to firms whose activities are in the flow of commerce while exercising to the full extent its constitutional power to regulate commerce in enacting the Sherman Act (Appellee's brief pp. 18–25.). It is unnecessary to speculate, as appellee does (*ibid.*), concerning the possible motives of Congress in passing the Clayton Act.[1] For, as pointed out in our main

[1] Appellee's suggestion (Br. p. 19) that the facts that the Sherman Act contains criminal penalties and that its application is often based on a *per se* doctrine are somehow related to

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brief (pp. 14–17, 19–20), the title of the Act and the 1914 legislative history demonstrate that the Clayton Act was remedial legislation designed to cure perceived deficiencies in the Sherman Act. It would indeed be illogical to assume that Congress intended the Clayton Act to be more limited in scope than the Sherman Act which it was designed to supplement.

In light of the remedial purpose of the Clayton Act, a narrow construction such as that sought by appellee would frustrate the statute's stated goal and should not be adopted in the absence of a clear expression of legislative intent. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 542–544; *Shapiro* v. *United States*, 335 U.S. 1, 31.

The legislative history of Section 7 of the Clayton Act, the selection of the same language concerning the commerce requirement as was used in the Sherman Act which adopted the literal words of the Constitution, and the construction accorded the statutory terms in contemporaneous judicial decisions confirm that the 1914 Act reaches all firms engaged in commercial activities that concern more states than one; that is, local activities that affect interstate commerce as well as activities in the "flow" of interstate commerce.

Appellee does not challenge our analysis of the 1914 legislative history of the Act; indeed, appellee does not refer to that material. Rather, appellee relies on

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the scope of its commerce requirement is illogical and finds no support in the legislative history or the case-law. And appellee's invocation of Section 3 of the Clayton Act as support for its position is misplaced since that section has been applied to local transactions. See *Standard Oil of California* v. *United States*, 337 U.S. 293.

subsequent administrative and legislative activities that it contends reveal the intentions of the original draftsmen of the Act. The evidence relied upon by appellee is, however, not probative. "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any significance.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (quoting *Rainwater* v. *United States*, 356 U.S. 590, 593). See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–349.

Moreover, the material appellee cites does not indicate the view of a subsequent Congress regarding the scope of the Clayton Act, because appellee refers only to the introduction of bills that contained "affecting commerce" language. Such bills do not even demonstrate that their sponsors believed the Act was limited in scope, because it is equally likely that the bills were proposed to remove any possible doubt on the question and thereby avoid the necessity for litigation. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47. In any event, "Congress neither enacted or rejected these proposals; it simply did not act on them." *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 609. Such congressional inaction does not constitute affirmative evidence of lack of authority. *Id.* at 610.[2]

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[2] The "rejection" evidence cited in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.* (No. 73–1012, decided December 17, 1974), slip op. at 13, concerning the commerce requirement of the Robinson-Patman Act is of wholly a different character. There, language which would have given the act a broader scope was deleted by a Conference Committee of the Congress which enacted the Robinson-Patman Act.

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2. Appellee's assertion that in 1950 Congress "re-enacted the same limited jurisdictional language it placed in the statute in 1914" (Appellee's brief, p. 32) and "considered and consciously rejected broadening the commerce language in Section 7" (*Ibid.*)[3] is incorrect. As shown in our main brief (pp. 17–18), the 1950 legislative history is consistent with our submission concerning the scope of the Act.

In particular, the House Report (H.R. Rep. No. 1191, 81st Cong., 1st Sess.) confirms that the 81st Congress did not view the acquisition of local enterprises with indifference. That report includes a chart of Borden Co. acquisitions, most of which obviously involved small local companies, as an illustration of the kind of acquisition program with which Congress was concerned (see Appendix A to this brief).

3. Appellee's reliance upon what it contends is a past pattern of enforcement is misplaced. Such an enforcement pattern would not be dispositive even if it existed. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 590. But more importantly, the Justice Department has never taken the position that Section 7 is restricted to the

[3] The 1950 amendments did not deal with the commerce requirement of the Act. It is significant, however, that the "any section of the country" language that was adopted as part of the test of competitive effect was substituted for the originally proposed "any community" language because of fears that the Act would be used against purely local transactions. (See our main brief, p. 34). These fears would have been unwarranted if the Act applied only to firms engaged in the "flow" of commerce.

acquisition of companies engaged in the "flow of commerce." Past actions merely reflect the absence of economically significant acquisitions prior to the recent trend toward concentration in some segments of the service sector.[4]

This case does not, as appellee contends (Appellee's brief 37–38), involve a radical departure from the previous enforcement pattern of Section 7 of the Clayton Act. In the past, the United States has challenged acquisitions of essentially local businesses that affected interstate commerce. See *e.g.*, *United States* v. *Von's Grocery Co.*, 384 U.S. 270; *United States* v. *County National Bank of Bennington*, 339 F. Supp. 85 (D. Vt.).

4. Appellee also contends that the Benton Companies' activities did not have any effect on the flow of interstate commerce (Appellee's brief pp. 8–14). As discussed in our main brief (pp. 36–44) however, the record shows the contrary. We add only the following:

a. Appellee suggests that janitorial and building maintenance services do not make any important contribution to the operations of the former Benton clients. But the affidavits of former Benton clients

[4] The sole evidence of restrictive administrative interpretation cited by the appellee is *In re Foremost Dairies*, 60 FTC 944, where the Federal Trade Commission held that one particular acquired company was not "engaged in commerce." The decision does not discuss the commerce issue in detail, but even if the *Foremost* opinion assumes that interstate sales or direct interstate purchases are required to place a dairy "in commerce", that isolated decision does not constitute a consistent administrative interpretation of long duration.

demonstrate that they do not share that view (App. 54–90).

b. Appellee also asserts that the statement that contracts were negotiated with out-of-state owners through the use of interstate communications facilities "is contrary to fact" (Appellee's brief 12). That assertion is inconsistent with appellee's motion to affirm (p. 18), which stated that Benton sent 203 interstate mail items "only a few of which related to the solicitation or negotiation of contracts." In any event, appellee does not dispute that persons who resided outside California had substantial contracts with Benton.

The Benton companies were engaged in activities which affect more states than one and their disappearance through merger and acquisition is subject to the Clayton Act.

The judgment of the district court should be reversed and the case remanded for trial.

Respectfully submitted.

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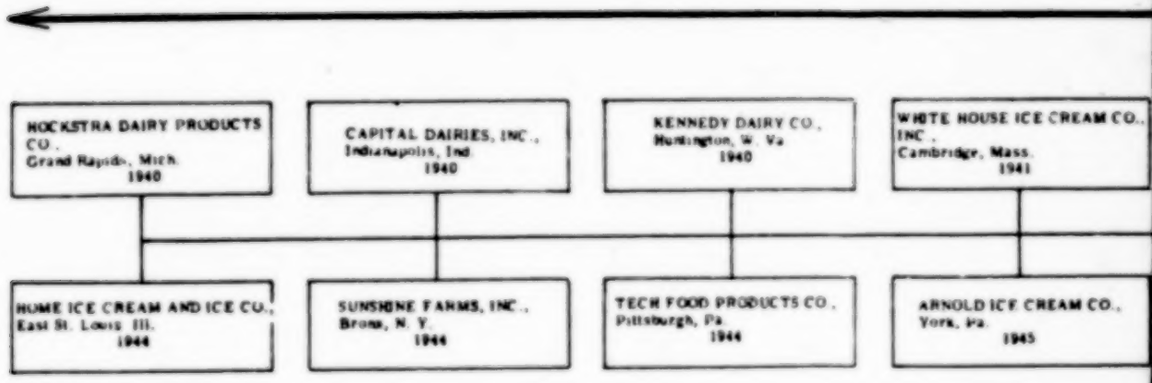
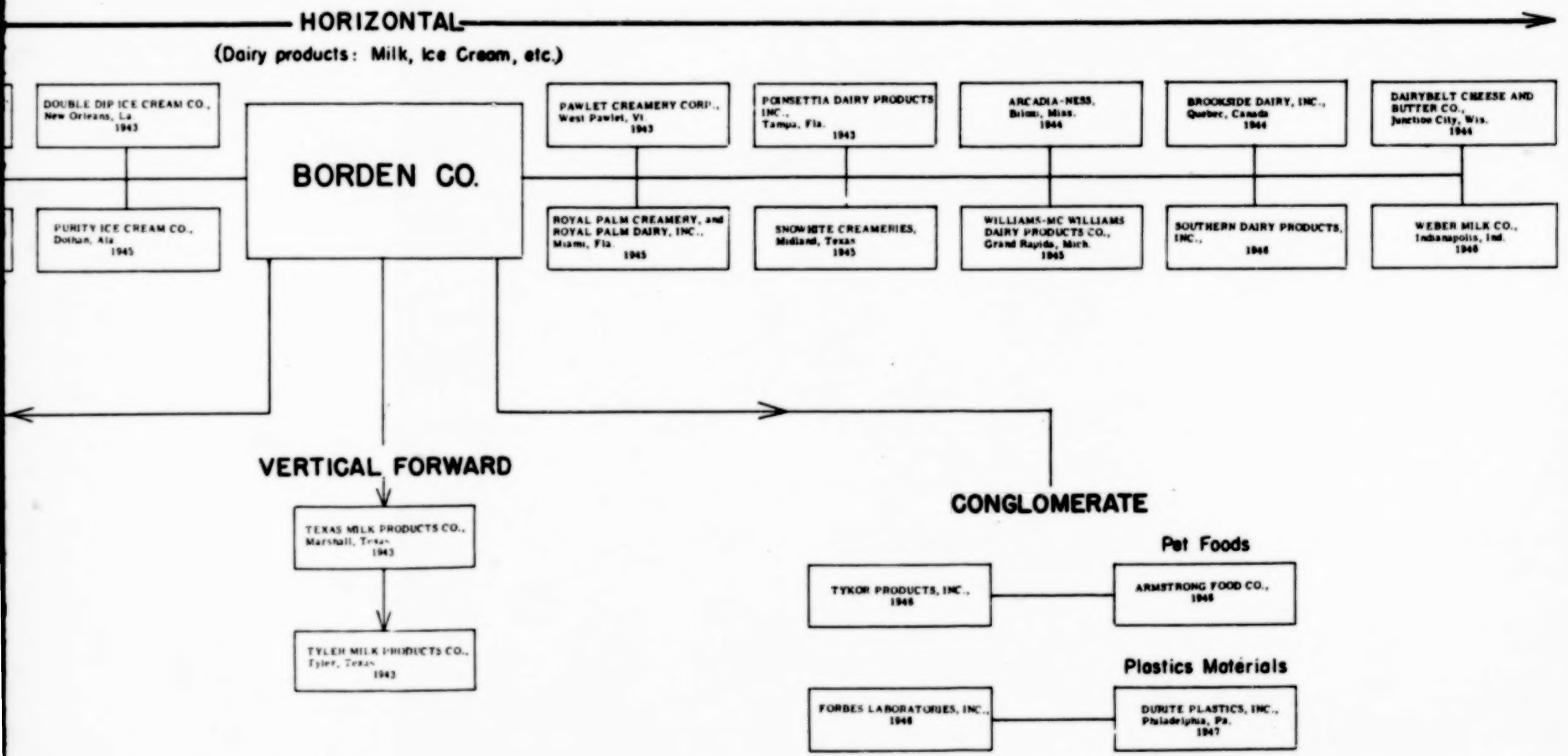


CHART I

OTHER ACQUISITIONS OF THE BORDEN CO., 1940-47



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